Jurisdictional Statement

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No. 81-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

COUNTY OF ARLINGTON, VIRGINIA,
Appellant,

and

BENNIE L. FLETCHER,
Treasurer of the County
of Arlington, Virginia,
Defendant,

v.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States Court of Appeals for the Fourth Circuit

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED BY THE APPEAL

I. Is an apartment building in Arlington County, Virginia, owned by the German Democratic Republic and subject to a nondiscriminatory ad valorem tax on real estate levied under Virginia law, exempt from the tax under any state of facts by virtue of a May 4, 1979, agreement made by the State Department and the German Democratic Republic, or by any other provision of the Constitution, treaties, or laws of the United States?

II. If any otherwise valid provision of the law of the United States exempts the apartment building from a nondiscriminatory ad valorem tax on real property imposed locally under state law, is this exemption within the authority granted to any branch of the federal government by the federal constitution?

III. Is the real property in question immune under the Foreign Sovereign Immunities Act after May 4, 1979, from execution of real estate tax liens existing before May 4, 1979?

IV. Is the United States estopped from litigating the tax exempt status of the real property in question for the period before May 4, 1979, by virtue of the final judgment for real property taxes obtained by Arlington County against the German Democratic Republic by orders entered September 6 and 7, 1978, by the United States District Court for the Eastern District of Virginia?

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Appellant,

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BENNIE L. FLETCHER,
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of Arlington, Virginia,
Defendant,

v.

UNITED STATES OF AMERICA,
Appellee.

On Appeal From The United States Court of Appeals for the Fourth Circuit

JURISDICTIONAL STATEMENT

The County of Arlington, Virginia, appeals from a final judgment of the United States Court of Appeals for the Fourth Circuit, affirming a judgment entered against it by the United States District Court for the Eastern District of Virginia, ruling that it could not assess an apartment building owned by the German Democratic Republic for ad valorem taxes after May 4, 1979. Arlington also appeals from the final judgment reversing the finding of the district court, that the property was subject to a tax lien for 1977, 1978, and part of 1979, which

Arlington could execute, and also reversing the finding that the United States was collaterally estopped from litigating whether the property was exempt from taxes assessed before May 4, 1979. Arlington unsuccessfully raised the issue of whether the German Democratic Republic should be a party in the courts below, but is not raising that issue in this Court.

OPINIONS DELIVERED IN THE COURTS BELOW

The opinion of the Fourth Circuit appealed from is reported at 667 F.2d 925. It is in the Appendix at pages 1a through 19a. The judgment of the District Court for the Eastern District of Virginia was not reported, but is embodied in the Order of November 14, 1980, and the Memorandum Opinion and Order of December 9, 1980, set forth in the Appendix at pages 20a through 27a. The portion of the transcript reporting the bench opinion of the district judge on November 14, 1980, is set out in the Appendix at pages 28a through 29a. The findings and orders of the district court in the case of *County Board* v. *Government of the German Democratic Republic* (Civil Action No. 78-293-A) were the subject of the controversy between the county and the United States in this case and made a part of the record. Those findings, conclusions, and orders were not reported, but are set out in the Appendix at pages 30a through 38a.

GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

In the 1978 case between the county and the German Democratic Republic, the district court adopted the county's proposed conclusions of the law that all real estate is subject to county ad valorem taxation as prescribed by state law, citing Va. Const., Art. X, § 4, and Va. Code Ann. § 58-758 *et seq.* The district court also adopted the conclusion that the property is not exempted from local ad valorem taxation under the Va. Const., Art. X, § 6. The court adopted various other findings and conclusions, including the conclusion that the property was subject to a lien under Va. Code Ann. § 58-762 and § 58-1022 *et seq.* (App. pp. 30a-37a.)

In this case, between the county and the United States, the district court held that the property continued to be taxable until May 4, 1979, on grounds of collateral estoppel, and the lien for taxes up to that date continued to be enforceable after that date. The district court took jurisdiction of the case pursuant to 28 U.S.C. §§1345 and 2201, and found the property exempt after May 4, 1979, by virtue of an Agreement between the State Department and the East German Government. (The Agreement will be referred to as the May 4, 1979, Agreement and is in the Appendix at page 38a.)

In an order and opinion dated February 1, 1982, the Court of Appeals for the Fourth Circuit reversed the district court's finding that the United States was collaterally estopped for the period before May 4, 1979, and remanded the case for further proceedings in the district court on the issue of whether the property was exempt before May 4, 1979. On April 22, 1982, the county filed its appeal of this order and opinion in the Fourth Circuit. See App. p. 39a-40a. (On April 16, 1982, the district court granted the motion of the United States for summary judgment and declared that the property was exempt from January 1, 1977 through May 4, 1979. The county has filed its Notice of Appeal of that judgment.)

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(2).[1]

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[1] Should this Court conclude that an appeal is inappropriate, the county requests that this Jurisdictional Statement be treated as a Petition for Writ of Certiorari under 28 U.S.C. § 1254(1), and grant the writ in order to give full consideration to the issues presented by this case. The reasons why those issues are substantial include the fact that important questions of federal law were decided by the federal court below which should be settled by this Court.

Because the circuit court held that the assessment otherwise applicable under the Virginia Constitution and Code was invalid, the county notes that 28 U.S.C. §2403(b) may be applicable and so the state attorney general will be served with this statement, even though the Treasurer of Arlington, a state officer, was a party below.

CONSTITUTIONAL PROVISIONS, STATUTES AND INTERNATIONAL AGREEMENTS INVOLVED

U.S. CONSTITUTION

Article VI, Clause 2, of the United States Constitution, the "Supremacy Clause", which provides:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby; anything in the Constitution or laws of any state to the contrary notwithstanding.[2]

FEDERAL STATUTES

The Diplomatic Relations Act of 1978, 22 U.S.C. § 254 a-e is set forth in the Appendix at pages 41a through 43a.

The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1603-1605 and §§ 1609-1610 is set forth in the Appendix at pages 44a through 46a.

TREATIES AND INTERNATIONAL AGREEMENTS

The Vienna Convention on Diplomatic Relations, pertinent portions of Articles 1, 23, 34, and 47 are set forth in the Appendix at pages 47a through 49a.

The Agreement effective May 4, 1979, is set forth in the Appendix at page 38a.

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[2] No other provision of the federal constitution has been cited by the United States or the courts below. However, it appears that Article I, Section 8, of the United States Constitution, stating the powers of Congress, and Article II, Sections 2 and 3, stating the powers of the President are also in issue.

VIRGINIA CONSTITUTION AND STATUTES

Article X, Sections 4 and 6 of the Virginia Constitution are set forth in the Appendix at pages 50a to 52a.

Real estate assessments are provided for by statute in Virginia in Chapter 15, of Title 58, of the Va. Code Ann. § 58-758 *et seq.* Provisions relating to delinquent taxes of land are set out in Chapter 21 of Title 58 of the Va. Code Ann. §58-1022 *et seq.* The statutes would require extensive quotation, and their precise provisions are not germane to the issues raised by this appeal. The county's position that the tax is regularly imposed and entitles it to a lien under Virginia law has never been disputed by the United States. What is of significance in this appeal is whether they can be invalidated by the federal actions and laws applied in this case. Therefore, those statutes have not been set out in the Appendix in full. Section 58-758, making real estate subject to local taxation and Section 58-762, one of the provisions for a lien, are set out in the Appendix at pages 53a-54a.

STATEMENT OF THE CASE

On July 28, 1976, the German Democratic Republic bought a multi-unit apartment building at 1515 S. Arlington Ridge Road in Arlington County, Virginia. (The unofficial name for the German Democratic Republic is East Germany, and throughout this case the initials GDR have been used.) The stated purpose of the building has been to house members of the diplomatic mission and their families, excluding only the Ambassador and his family.[3] The taxes were paid by the seller

[3] The 4th Circuit found that "[r]egardless of the property's use in 1977 or 1978, [Footnote omitted.] the record discloses that from May 4, 1979, the apartment exclusively housed the members of the diplomatic, administrative, technical, and service staff of the GDR Embassy and their families." *United States* v. *Arlington*, 669 F.2d 925, 933-34 (4th Cir. 1982). Arlington's position is that there is *no* evidence in the record based upon which a court could properly reach any conclusion about the use of the property. This issue was pursued further in the district court when the court reached its summary

(*footnote continues*)

for 1976. Arlington assessed taxes on the building of $24,384.02, in 1977, of $23,643.70, in 1978, and of $7,144.44, for the period from January 1, 1979 to May 4, 1979. (Appendix in 4th Cir. Appeal, p. 6).

In 1978, Arlington County brought an action against GDR in the Arlington Circuit Court to collect the 1977 taxes. East Germany first tried to remove the case to the United States District Court for the District of Columbia and, when that court remanded the case, then successfully removed it to the Eastern District of Virginia. A Motion to Dismiss the county's complaint was filed together with an Answer that denied all of the material allegations of the county's initial pleading and stated four affirmative defenses. (App. in 4th Cir. pp. 238-50.) The district court overruled the motion to dismiss by an order entered September 6, 1978 (App. pages 34a through 36a). In overruling the Motion to Dismiss, the district court concluded that the nature of the conduct in question was commercial and thus the property was not exempt under the Foreign Sovereign Immunities Act of 1976, and that it was not exempt from local taxation under any treaty or international law. Judgment was entered for the county for the 1977 taxes, with interest, on September 7, 1978.

Before filing the case against East Germany in 1978, Arlington had been told by the State Department that there was no basis for exempting the property. This has been disputed by the United States in this case, but there is support for this in the record. (See for example, App. in 4th Cir., p. 199.) It appears that the State Department, at least up to 1978, was not treating residential property as exempt unless it was specifically exempt under a particular treaty or international agreement or it was the residence of the head of the mission and exempt under the Vienna Convention (App. pages 47a-

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(footnote continued)

judgment concerning the use of the property from January 1, 1977 through May 4, 1979. There are additional affidavits and other statements the district court treated as affidavits which the county unsuccessfully argued were not an adequate evidentiary basis for a finding about use. This decision is being appealed to the 4th Circuit Court of Appeals.

49a).[4] Sometime during 1978, the State Department seems to have begun a reevaluation of this issue stimulated in part by the Arlington lawsuit (App. in 4th Cir. p. 192). In an August 2, 1978, memorandum of law, the State Department Office of the Legal Advisor discussed the following options:

> "1. Modify current interpretation of the Vienna Diplomatic Relations Convention to include residential properties held by the sending State and used only for the purpose of providing housing for transient diplomats within 'premises of the mission' within the meaning of Articles 1(i) and 23.
>
> "2. Modify interpretation of Article 34(b) of the Convention to allow tax exemption for private residential property held by a diplomatic agent either expressly on behalf of the sending State or under circumstances where it is clear that he has been given authorization to acquire housing solely for the purpose of his tour in the receiving country. [Footnote omitted.]
>
> "3. Adopt both Options 1 and 2 above.
>
> "4. Maintain the current interpretation, limiting exemption only to the residence of the head of the mission." (App. in 4th Cir., pp. 197-198.)

The result of this reconsideration did not become clear until this case was filed by the United States against Arlington. In the meantime, by an exchange of Notes, the State Department and GDR reached the Agreement effective May 4, 1979. The Diplomatic Relations Act of 1978 was approved on September 30, 1978, and was to take effect on December 29, 1978. The State Department interpreted § 4 of the Act (22 U.S.C. § 254c) as permitting it to exempt property of this kind. Executive Order 12101, November 17, 1978, 43 F.R. 54195, delegated to the State Department authority to make whatever

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[4] Examples of the State Department's position are found in *Digest of United States Practice in International Law* (1975), pp. 247-48; *Digest of United States Practice in International Law* (1976), pp. 200-01.

agreements are permitted under the Act. The United States admitted in the district court that the basis for its authority was § 4 of the Act (App. in the 4th Cir. p. 59).

When the county continued to ask East Germany for taxes before May 4, 1979, and to tell the State Department that it believed the property was taxable after May 4, 1979, the United States brought this action requesting (1) a declaratory judgment that the property was exempt from the county tax since it was bought by the GDR, (2) the voiding of all assessments and liens affecting the property, and (3) an injunction prohibiting further attempts to collect such taxes from the property or the German Government. The district court heard cross-motions for summary judgment in which the United States asked that it be granted this relief, and Arlington asked for collateral estoppel to be applied up to May 4, 1979, and for the complaint to be dismissed because the May 4, 1979, agreement was not authorized by law and because no other law authorized an exemption. The district court held that the May 4, 1979, agreement exempted the property from taxes after that date, and also ruled that the United States was collaterally estopped by the 1978 judgment from relitigating the issue of prior tax liability. As a result, the district court ruled that the property was subject to an enforceable lien for taxes assessed from January 1, 1977 to May 4, 1979. All of the questions presented by this appeal were argued to the district court and passed on by virtue of its ruling.

The court of appeals affirmed the district court as to the effect of the May 4, 1979 Agreement, and reversed the district court's ruling as to the lien and collateral estoppel, remanding the case to the district court for a determination of whether or not the property was exempt before May 4, 1979. All of the questions presented by this appeal were before the circuit court and argued in the briefs of the parties. On remand, the district court summarily decided on April 16, 1982, that the property was exempt for the period from January 1, 1977 to May 4, 1979.

STATEMENT OF WHY THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This Court has never considered whether a treaty, international agreement or other applicable federal law exempts foreign owned real property from local taxation pursuant to the law of one of the states of the United States. Furthermore, this Court has never decided whether or not the federal constitution allows any branch of the federal government to exempt real property so owned from a nondiscriminatory ad valorem real estate tax imposed under state law.

The circuit court has established a precedent for an independent power of the President to exempt foreign owned real property from state taxation, and no other case has done so. It is important for this Court to review this extension of the President's independent power, especially because of its effect on an important attribute of State Sovereignty.

The court of appeals has allowed the United States to relitigate a final, unappealable judgment that the county has against East Germany for 1977, specifically declaring that the county has a lien for 1977 taxes, and to extinguish the lien for that year, 1978, and part of 1979, when there is no international agreement applicable to those years which would exempt the property from real estate taxes. The court of appeals has also ruled that the United States is not collaterally estopped to litigate the exempt status of the property for 1978 and part of 1979, even though it simultaneously allowed the United States to represent the interest of the property owner.

1. State Department Authority To Execute The May 4 Agreement.

The Fourth Circuit conceded that Arlington's argument about the applicability of the Diplomatic Relations Act of 1976 as authority for the May 4, 1979, Agreement "is consistent with a literal reading of the statute. . . ." *United States* v. *Arlington*, 669 F.2d 925, 930 (4th Cir. 1982). Arlington had argued that 22 U.S.C. § 254(c) allowed the President to treat "members of the mission," "their families" and "diplomatic couriers" more

or less favorably than is provided under the Vienna Convention, but it did not provide a basis to treat a foreign *government* differently. The circuit court stretches the limits of rationality by reaching into Article 47 of the Vienna Convention which treats the question of discrimination among foreign states by any particular state. Because the Diplomatic Relations Act of 1978 was enacted as a means of allowing states to discriminate favorably as Article 47 allows, the circuit court concludes that the provisions of the Act may be extended to governments wherever individual persons are mentioned. This is very strange. 22 U.S.C. § 254d provides judicial immunity for individuals. On the reasoning of the court of appeals, this judicial immunity would be extended to the government, without regard to the Foreign Sovereign Immunities Act of 1976. 22 U.S.C. § 254e requires insurance according to Presidential regulations for members of the mission and other individuals, but it also expressly mentions the mission. On the reasoning of the court below, mention of the mission was unnecessary.

One element of the subsequent legislative history of the Diplomatic Relations Act was not mentioned by the circuit court. In the First Session of the 97th Congress, H.R. 3518 was introduced. That bill proposed the following amendment of 22 U.S.C. § 254c:

> "SECTION 4. The President may, on the basis of reciprocity and under such terms and conditions as he may determine, specify privileges and immunities for *the mission, the* members of the mission, their families, and the diplomatic courier [of any sending state] which result in more favorable treatment or less favorable treatment than is provided under the Vienna Convention."

House of Representatives Report 97-102, Part 1, p. 44 (May 19, 1981) had commented on this proposed amendment, as follows:

> "Section 119(d)(3)(A) similarly adds an explicit reference to the mission itself in section 4 of the Diplomatic Relations Act, which authorizes more

> favorable or less favorable treatment in the United States on the basis of reciprocity. Like section 3(b), discussed above, section 4 of the Diplomatic Relations Act presently refers only to individuals, giving rise to the same questions of interpretation. These amendments to section 3(b) and 4 of the act are in accord with the State Department's interpretation of the present law and are merely designed to correct an earlier drafting oversight."

This shows more understanding of the issue than does the opinion of the circuit court. If language is going to continue to mean anything, then the United States must not be permitted to use words any way that it chooses.

After Arlington made its opening argument in the circuit court, the United States responded that the Agreement was authorized by the Diplomatic Relations Act, but it also raised for the first time the argument that the Agreement was authorized as an Executive Agreement. This was in spite of the fact that by its admissions in the district court, the United States had relied only on 22 U.S.C. § 254c. The court of appeals goes beyond the government's argument and rests its approval of the May 4, 1979, Agreement primarily on the independent power of the President to enter into international agreements.

Before dealing with the argument that there was independent power to exempt foreign-owned real property from taxation in the states, it is important to emphasize that no agreement was ever made under the independent power of the President. The President authorized agreements under the Diplomatic Relations Act. This Agreement was purportedly made under it. The President never authorized any other agreements. The court of appeals strays off into a justification of the exercise of the 22 U.S.C. § 254c authority by a Deputy Assistant rather than an Assistant Secretary of State. That is not a central issue. The issue is that the United States admitted the only authority for the May 4, 1979, Agreement was delegated under 22 U.S.C. § 254c. If that does not support this action, then the United States has admitted that no independent power of the President

was delegated. There can be no presumption of official regularity inconsistent with this admission. In spite of this, the lower court found one. *United States* v. *Arlington, supra* at 931.

The circuit court's reliance on the independent power of the President could be fairly characterized as very offhand, even if the Agreement purported to be a use of the independent power. The court does not define the power, nor state its limits, nor make clear the differences between such an agreement and a treaty. In fact, the decision can be cited as authority for a large addition to the President's independent power. Never before has any court said that the President has independent power to exempt real property of a foreign government from ad valorem taxation by a state.

The subject matter of these agreements has been based on the President's power as commander-in-chief and to conduct foreign policy. *Restatement of the Law (Second), Foreign Relations of the United States* (1965) § 121, pp. 378-80. Even though it can be argued that foreign relations is involved here, a mere tangential foreign relations factor should not override an important consideration of interpretation of the Constitution. Even if such property may be exempted by a treaty ratified by the Senate or by an action of the President authorized by valid legislation, it would be very upsetting to federal-state relations to allow the President to create independently such exemptions. The limits on the power should be defined, because there is no reason why the President could not independently admit foreign diplomats to practice in the courts of the fifty states, or do any number of other things under the loose reasoning of the circuit court.

2. Other Possible Sources Of Power To Exempt.

If this Court concludes that the May 4, 1979, Agreement was not authorized by 22 U.S.C. § 254c, and that there was no attempt to exercise the independent power, then it must either find some other basis for the exemption or rule that the property is not exempt. The county does not believe there is any other basis for exemption. The United States argued for the first time on appeal in the Fourth Circuit that a 1923 Treaty of Friendship, Commerce, and Consular Rights with Germany,

44 Stat. 2132, T.S. No. 725, exempted the property. This Treaty is inapplicable. The Agreed Minute of September 4, 1974, 25 U.S.T. 2597, 2598, T.I.A.S. No. 7937, established relations between the United States and East Germany. It dealt with consular relations as well as diplomatic relations. It ignores the 1923 Treaty. It is then a tacit or implied abandonment or renunciation of the Treaty. See *Clark* v. *Allen,* 331 U.S. 503 (1947).

Although the United States had earlier interpreted the Vienna Convention as not exempting property such as this, it argued below that the Vienna Convention on Diplomatic Relations exempts this property from local real estate taxation. The plain language of Article 23(1) and 34 is clear. That language would plainly exempt mission offices and the residence of the head of the mission only, and the State Department had so interpreted it until this case. That is the correct interpretation.

If this Court does find there was an attempt to exercise the independent power of the President, then it should then decide the important question of whether the independent power extends to matters such as this. As the county has argued above, it does not. If this Court agrees, then before real property can be exempted from nondiscriminatory ad valorem taxes in the states, Congress will have to enact specific legislation providing in some way for exemptions. The county's position is that even Congress lacks the power to create exemptions under these circumstances. Congress may agree with the county's position on Constitutional grounds, or on policy grounds it may refuse to transfer this burden of conducting foreign relations to a comparatively few localities. Congress may give the same effect as exemption by providing for federal payment of local taxes as do countries like the United Kingdom, New Zealand, and others.

If this Court thinks that this power is within the President's independent powers, then, before reaching that conclusion, it should consider the following argument of the county that the Constitution does not allow an invasion of the sovereign right of the states to tax the real property of foreign governments.

3. The Constitution Does Not Delegate To The National Government The Unlimited Power To Exempt Foreign Owned Real Property From State Taxation.

The court of appeals relies primarily on *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304 (1936), to reach its conclusion that the federal government has been transferred the sovereign power of the states to tax real property because it is sovereign in the area of foreign policy. The county does not dispute federal control of foreign policy. All it disputes is federal control of this particular taxing power.

It is for this reason that the question of whether the power to conduct foreign affairs is inherent or delegated is not crucial to the county's case. The counter argument seems to assume that if one accepts United States control over foreign affairs, one must without any additional consideration accept federal power to exempt real property. No one has said why this power is essential to federal control of external affairs. Thus, even if the opinion of Justice Sutherland in *United States* v. *Curtiss-Wright Corp., supra* at 315-18, is correct, it does not settle the question of whether state power to tax real property may be invalidated by federal power over foreign relations.

It needs to be noted that the language quoted from the *Curtiss-Wright* opinion does some violence to the language of the Declaration of Independence, the Articles of Confederation, and the Constitution. The Declaration of Independence declares the United Colonies free and independent States, using states in the plural. It states that "as free and independent states, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce," etc. It thus sees the states as several, and assumes but does not require that they will act jointly. Article II of the Articles of Confederation is very clear: "Each state retains its sovereignty, freedom, and independence, and every Power, Jurisdiction and right, which is not by this confederation *expressly* delegated to the United States, in Congress assembled." (Emphasis added.) Article VI forbids a state "without the Consent of the United States in Congress assembled [to] send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty with any king, prince or state . . . ."

Article I, Section 10 of the Constitution absolutely forbids a treaty, alliance, or confederation to a state although with the consent of Congress it may enter into an agreement or compact with a foreign power. Article IX of the Articles of Confederation states that the "United States in Congress assembled shall never . . . enter into any treaties or alliances . . . unless nine states assent to the same . . . ." Article IX also provided that Congress should have "the sole and exclusive right and power . . . of sending and receiving ambassadors entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective states shall be restrained from imposing such imports and duties on foreigners as their own people are subjected to . . . ." It is difficult to see how it can be concluded that what lies behind the Articles of Confederation is a theory that power over external affairs is an inherent power of the national government.

Another problem with Justice Sutherland's theory is that it does not answer the question of where the power over foreign relations would reside if the provisions relating to treaties, ambassadors, public ministers and consuls were removed from Sections 2 and 3 of Article II of the Constitution and the reference to treaties was removed from Article VI. The logical extension of the view he expresses is that the powers would still reside in the federal government. This would be a ridiculous result. The Fourth Circuit's reliance upon the *Curtiss-Wright* decision is misplaced. It is all but impossible to read the language of the Articles and Constitution and not conclude that power over foreign relations is delegated power. However, to argue that the delegation of this power also delegates the power to regulate this state taxation would be like arguing that the delegation of the power to regulate foreign and interstate commerce gives Congress the power to exempt real property from state taxation. Cf. *National League of Cities* v. *Usery*, 426 U.S. 846, 843 n. 14 (1976).

The county also argues that *Nevada* v. *Hall*, 440 U.S. 410 (1979), should be read for clarifying what foreign sovereign immunity really is: a matter of comity. Of course, there are many areas in which Federal Law determines those matters of

comity. There is no case in this Court which expressly rules that state taxation of foreign owned real property is one of these areas.

This Court should note the opinion about the state taxing power expressed by Hamilton in Federalist No. 32:

> "I affirm that (with the sole exception of duties on imports and exports) they would, under the plan of the convention, retain that authority in the most absolute and unqualified sense and that an attempt on the part of the national government to abridge them in the exercise of it would be a violent assumption of power, unwarranted by any article or clause of its Constitution."

Although, many persons may assume that the county's position is incorrect, that assumption has not always been made:

> "It needs no argument to prove that an attempt on the part of the United States, by compact with a foreign government to qualify the right of suffrage in a state, prescribe the terms and mode of elections, or to restrain the power of taxation under state authority, would transcend the limits of the treaty-making power, and be entirely void . . . ." *Pierce* v. *State*, 13 N.H. 536, 576 (1843), aff'd 46 U.S. 504 (1846).

During periods of this Court's history, the doctrine of intergovernmental immunity has been applied very mechanically. The implied presumption of the court of appeals in favor of immunity is an example of this more mechanical approach. If this question is reached, the county urges a review freed from the mistaken presuppositions which seem to have been in operation in the court below.

4. The Enforceability of the Lien.

The court of appeals committed several errors in concluding that the property was immune after May 4, 1979, from execution of any liens in earlier years. The court's decision is unsupported by the record, directly contradictory with the purpose of the Foreign Sovereign Immunities Act, and, in

effect, harks back to the absolute theory of sovereign immunity rather than following the restrictive theory of immunity.

The court said that "[r]egardless of the property's use in 1977 or 1978, [Footnote omitted.] the record discloses that from May 4, 1979, the apartment exclusively housed the members of the diplomatic, administrative, technical, and service staff of the GDR Embassy and their families." *United States* v. *Arlington, supra* at 933-34. This is an error. The record does not disclose this. The opening brief of the United States in the court below alleged that this fact based on reference to pages 33, 56, and 151 of the Record in the Fourth Circuit (U.S. Brief as Appellant, pp. 3-4). Page 33, referred to by the United States, was the county's request for admission that (1) the property was not used for the residence of the head of the mission, and (2) the property was not used for diplomatic or consular offices of the mission. Page 56, referred to by the United States, was its admission of these facts. Page 151 referred to, is p. 22a of the Appendix to this Jurisdictional Statement. The district court in its December 9, 1980, Memorandum Opinion, simply stated in a casual way that the 1978 case involved property "used to house mission staff and their families." It would be incongruous if, while finding the use after May 4, 1979, and specifically not making a finding before May 4, 1979, the court was relying on a statement about 1978. In any event, the statement of the district court has no basis in the record. The findings in the 1978 case do not include such a finding. The county knows of no basis in the record in either case for such a finding. (The United States submitted affidavits on remand in which it concludes the property was used as found. The county disputes this.)

The court also said: "The views of the Department concerning the scope of this phrase ["used for purposes of maintaining a diplomatic or consular mission"], though not conclusive, are entitled to great weight." *United States* v. *Arlington, supra* at 934. No authority is cited for this proposition, probably because there was no authority for it. The key purposes of the Foreign Sovereign Immunities Act were to adopt the restrictive theory of sovereign immunity and to

remove the State Department from the decision making process. This is stated in the January 22, 1973, letter from the Secretary of State to the President of the Senate, 119, Pt. 34 Cong. Rec. 2215 (January 26, 1973). In particular, that letter states: "The central principle of the draft bill is to make the question of a foreign state's entitlement to immunity an issue justifiable [sic] by the courts, without participation by the Department of State." *Id.* The inability of the court of appeals to conform to the controlling statute is borne out in its adherence to the case of *Mexico* v. *Hoffman,* 324 U.S. 30 (1945). *United States* v. *Arlington, supra* at 934.

In connection with this finding, the circuit court also overlooked the fact that the State Department had been in the process of changing its own position. As recently as 1978, if not later, the State Department had not treated property used as the court assumed this property was used, as exempt in the absence of an international agreement. (See the quotation from the August 2, 1978, State Department Memorandum above for example.) In effect, the court's decision would allow the shifting and changing opinion of the State Department to change the interpretation of the Foreign Sovereign Immunities Act. A very important factor is that the Act itself by expressly including "a diplomatic or consular mission or the residence of the head of the mission" (28 U.S.C. § 1610(a)(4)(B)) by ordinary rules of interpretation excludes other residences.

Authority for Arlington's position can be found in *Victory Transport Inc.* v. *Comisaria General,* 336 F.2d 354, 359 (2d Cir. 1964), in which the rental of a house for an embassy was said to be a private act. The Fourth Circuit argues that this only applies to the rental contract, and makes an unstated and illogical leap in its analysis by concluding that residential use for embassy employees is governmental. The unstated assumption of the circuit court conflicts with this Court's reasoning in *United States* v. *Fresno,* 429 U.S. 452(1977), which does not treat federal employees who reside in housing owned by the federal government as engaged in a governmental activity in their occupancy. The use of the Arlington apartment is no more governmental than was the use of the houses in the National Forests. These errors of the circuit court should be corrected.

5. The Estoppel Issue.

The Fourth Circuit held that the United States was not estopped from relitigating the immunity (from local taxation) of the property during the period before the May 4, 1979 agreement. The effect of this ruling was to allow relitigation of a final judgment which the county had earlier obtained in its litigation with the GDR. Moreover, it permitted the United States to litigate the 1977 tax status of the property after the applicable statute of limitation had expired. See Va. Code Ann. § 58-1145.

In that earlier litigation, the county obtained an order and judgment (which was never appealed) that found the use of the property commercial in nature from the time GDR bought it. The GDR had made a Motion to Dismiss the county's action, to collect taxes on the property for the 1977 tax year, to establish a lien against it, and to hold the GDR personally liable for the taxes.

In the Order entered September 6, 1978, (See App. at pp. 34a-36a) the district court noted that the basis of GDR's motion to dismiss was an alleged lack of personal and subject matter jurisdiction and, most importantly here, that the property was "immune" under the tests set out in the Vienna Convention well as " 'under recognized principles of international law.' " App. p. 34a. The district court heard argument, denied GDR's motion to dismiss, and concluded from the pleadings, affidavits and arguments that the nature of the course of conduct being carried on was commercial, and that the property was not exempt under treaty or international law. App. pp. 35a-36a. At the trial the GDR's Answer and defenses were still before the court and GDR's counsel was present, and the court adopted the county's proposed findings of fact and law and entered its final order on September 7, 1978, granting judgment for about $26,000 plus interest, declaring that the property was subject to the tax lien, and declaring that GDR was personally liable for the amount.

The Fourth Circuit denied estoppel on two grounds: (1) the United States was not in "privity" with GDR and (2) that

there were certain issues about the use of the property which the GDR did not litigate in the earlier case. This was error.

While the Fourth Circuit concluded that the United States had a sufficient interest to pursue the issue of the immunity of the property, it then ruled that the United States did not have a sufficient prior interest in the earlier action to invoke estoppel. The Fourth Circuit thus rejected the district court's conclusion that while it was true the United States had a different "motivation for asserting the immunity", there was no question but that the right or interest of the United States and GDR at stake was the same taxable status of the subject property. App. p. 23a; see also 16 *Moore's Federal Practice,* paragraph 0.411[12] (privity may arise out of a concurrent relationship to the same right). If the particular motivation or indirect interest of a party determine whether that party may relitigate an issue and effectively destroy the judgment right of another party, there are no limits to the cases which the United States may seek to relitigate.

The second reason given by the Fourth Circuit for denying estoppel is not justified by law, or, most importantly, by the record. First of all, the tax status was litigated by GDR in its motion to dismiss in the earlier litigation, and it lost the issue as a factual and legal matter. App. at 34a-36a. Second, although the circuit court seems to say there was a default judgment, in fact there was not. See App. p. 26a. It mentions the trial as to the amount of the assessment and lien, but it omits the earlier hearing on the GDR's motion to dismiss wherein the facts surrounding the use of the property were considered. It also ignores the fact that GDR fully answered and raised defenses and appeared by counsel at every stage of the proceedings, including the trial. But whatever occurred in the earlier litigation it is important to note that estoppel should apply to all issues necessarily decided by a judgment.

What is inescapable about the Fourth Circuit's refusal to apply estoppel, and a very significant reason for this Court's plenary consideration, is the inherent unfairness of the result. The county had obtained a final judgment which entitled it to certain money, and now the Fourth Circuit has essentially said

that the judgment is worthless. Presumably, if the county had executed on its judgment, the United States would seek to have the county refund the money to the GDR.

CONCLUSION

The questions presented by this appeal are substantial questions of Constitutional interpretation, involving important questions of federal-state relations, and there are also questions of interpretation of Federal Statutes which the circuit court did not interpret consistently with their plain meaning. In addition, the court of appeals based its opinion on the interpretation of the State Department on issues in which the State Department had taken inconsistent positions during the period relevant to the litigation.

It is important for this Court to give plenary consideration to the issues involved here, because it has not previously considered the question of the independent power of the President to create exemption of real property from state taxation, or even of the federal power to do so in the case of real property owned by foreign governments. These questions are clearly appropriate for review on certiorari and should be reviewed on that basis if jurisdiction for the appeal is not found. However, probable jurisdiction should be noted.

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United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 81-1094

UNITED STATES OF AMERICA,
Appellee,

-v-

COUNTY OF ARLINGTON, VIRGINIA,
Appellant.

and

BENNIE L. FLETCHER, JR.,
Treasurer of the County of Arlington, Virginia,
Defendant.

No. 81-1125

UNITED STATES OF AMERICA,
Appellant,

-v-

COUNTY OF ARLINGTON, VIRGINIA,
and BENNIE L. FLETCHER, JR., TREASURER OF THE COUNTY OF ARLINGTON, VIRGINIA,
Appellees.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., Judge.

Argued October 7, 1981 Decided February 1, 1982

Before BUTZNER, Circuit Judge, FIELD, Senior Circuit Judge, and SPROUSE, Circuit Judge.

John J. McCarthy, Tax Division, Dept. of Justice (Justin W. Williams, United States Attorney; John F. Murray, Acting Assistant Attorney General; Michael L. Paup, David English Carmack, Tax Division, Dept. of Justice on brief) for appellant; Charles G. Flinn, Deputy County Attorney (Jerry K. Emrich, County Attorney on brief) for appellees.

BUTZNER, Circuit Judge:

This appeal involves the tax status of an apartment building owned by the German Democratic Republic (GDR) in Arlington County, Virginia. The district court ruled (1) the county could not assess taxes on the property after May 4, 1979; (2) the property was subject to a tax lien for 1977, 1978, and part of 1979, which the county could presently execute; (3) the United States was collaterally estopped from litigating whether the property is exempt from taxes assessed prior to May 4, 1979. We affirm the judgment of the district court on the first issue, reverse with respect to the second and third issues, and remand the case for further proceedings.

I

On September 4, 1974, the United States and the German Democratic Republic entered into an agreement which established bilateral diplomatic relations.[1] In 1976, the GDR purchased an apartment building in Arlington County, Virginia, to house the staff of its diplomatic mission and their families.

In 1978, the county brought suit against the GDR seeking a judgment in the amount of unpaid real estate taxes for 1977 and the declaration of a tax lien. The GDR appeared specially to contest the district court's jurisdiction. The United States, though notified of the suit, did not intervene because State

[1] Agreed Minute on Negotiations Concerning the Establishment of Diplomatic Relations, 25 U.S.T. 2597, T.I.A.S. No. 7937.

Department officials then doubted that the property was exempt from taxes. In an order entered September 6, 1978, the district court concluded that it had jurisdiction under the Foreign Sovereign Immunities Act of 1976 because "the nature of the course of conduct being carried on by the [GDR] in its ownership of the immovable property subject to this action is commercial in character . . . [and] [t]he action also places in issue rights in immovable property situated in the United States."[2] The court entered judgment for the county in the amount of the taxes due on the property with interest and declared the property was subject to a tax lien imposed by Va. Code § 58-762.

The GDR then protested to the State Department that it could not accept the judgment obtained by the county because the GDR was immune from the jurisdiction of United States courts and the suit was impermissible according to the principles of international law. Upon further consideration, the State Department concluded that the property was not taxable. Accordingly, the United States and the GDR entered into an agreement of May 4, 1979, which provides in part:

> [A]n agreement exists between the Government of the United States of America and the Government of the German Democratic Republic with regard to the reciprocal exemption from real estate taxes for property owned, now or in the future, by the Government of the German Democratic Republic and by the

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[2] Pub. L. No. 94-583, 90 Stat. 2891, codified as 28 U.S.C. §§ 1330, 1332, 1391, 1441, 1602-11.

Section 1605(a)(2) and (4), on which the district court relied, provides in part:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
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> . . . .
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; . . .
>
> . . . .
>
> (4) in which rights . . . in immovable property situated in the United States are in issue. . . .

> Government of the United States, when such property is used exclusively for purposes of their diplomatic missions, including residences for the staff of their diplomatic missions and members of their families forming part of their households. The effective date of said agreement is May 4, 1979.

Notwithstanding this agreement, the county continued to tax the property.

At the request of the Department of State, the Attorney General filed this action requesting (1) a declaratory judgment that the property was exempt from the county tax since its purchase by the GDR, (2) the voiding of all assessments and liens affecting the property, and (3) an injunction prohibiting further attempts to collect such taxes from the property or the German government. The district court held that the May 4, 1979, agreement exempted the property from taxes from that date. The court ruled, however, that the United States was collaterally estopped by the 1978 judgment from relitigating the issue of prior tax liability. Consequently, the court ruled that the property was subject to an enforceable lien for taxes assessed from 1977 until May 4, 1979.

II

The county contends that the United States was required by Federal Rule of Civil Procedure 19 to join the GDR. Without joinder, the county asserts, the district court could not afford it complete relief against the GDR. It suggests that even if the judgment is affirmed, it may have to initiate another action against the GDR to collect taxes for 1978 and part of 1979.

We cannot accept the county's argument. The United States did not institute this action simply to assert the claims of the GDR. The complaint discloses that the United States sued to vindicate its own policy and authority:

> This action is brought by the United States at the request of the Department of State, an agency of the

> United States, (1) to protect the sovereign rights and interests of the United States, (2) to prevent embarrassment of relations between the United States and foreign nations, and (3) to enforce the laws of the United States.

The United States can sue to enforce its policies and laws, even when it has no pecuniary interest in the controversy. *See* United States v. Arlington County, 326 F.2d 929, 932 (4th Cir. 1964). This principle has been invoked to enable the United States to honor its treaty obligations to a foreign state. Sanitary District v. United States, 266 U.S. 405, 425-26 (1925). And it has been applied to allow the United States to seek redress against a municipality that taxed a foreign government's property in contravention of the laws of the United States. United States v. City of Glen Cove, 322 F. Supp. 149, 152-53 (E.D.N.Y. 1971), *aff'd per curiam*, 450 F.2d 884 (2d Cir. 1971).

Moreover, the county's argument misconstrues rule 19(a)(1). The rule provides that a person shall be joined if feasible where his absence precludes "complete relief . . . among those already parties." " 'Complete' relief refers to relief as between the persons already parties, not as between a party and the absent person whose joinder is sought . . . ." 3A Moore's Federal Practice ¶19.07-1[1] at 19-128; *see also* Morgan Guaranty Trust Co. of New York v. Martin, 466 F.2d 593, 598 (7th Cir. 1972). Complete resolution of the dispute between the United States and Arlington County does not require the joinder of the GDR.

We therefore conclude that the GDR was not a necessary party to this action, and the district court did not commit error by proceeding without requiring its joinder.

III

The county assigns error to the district court's ruling that the agreement of May 4, 1979, between the United States and the GDR exempted the apartment from taxation after that

date. It contends that no officer of the United States was authorized to enter into this agreement.

We conclude that the district court did not err by upholding the validity of the 1979 agreement. The President is empowered to recognize the government of a foreign state. Guaranty Trust Co. v. United States, 304 U.S. 126, 137-38 (1938). This authority is not confined to the act of recognition. Among the principal cases dealing with the scope of this power are United States v. Belmont, 301 U.S. 324 (1937), and United States v. Pink, 315 U.S. 203 (1942), which upheld the validity of an assignment and agreement for the settlement of claims incident to the President's recognition of the Soviet Union. In *Belmont,* 301 U.S. at 330-31, the Court said:

> The recognition, establishment of diplomatic relations, the assignment, and agreements with respect thereto, were all parts of one transaction, resulting in an international compact between the two governments. That the negotiations, acceptance of the assignment and agreements and understandings in respect thereof were within the competence of the President may not be doubted. Governmental power over internal affairs is distributed between the national government and the several states. Governmental power over external affairs is not distributed, but is vested exclusively in the national government. And in respect of what was done here, the Executive had authority to speak as the sole organ of that government. . . . [A]n international compact, as this was, is not always a treaty which requires the participation of the Senate. There are many such compacts, of which a protocol, a modus vivendi, a postal convention, and agreements like that now under consideration are illustrations.

The Court reiterated these principles in *Pink,* 315 U.S. at 229-30:

> Recognition is not always absolute; it is sometimes conditional. Power to remove such obstacles to full

> recognition as settlement of claims of our nationals certainly is a modest implied power of the President who is the "sole organ of the federal government in the field of international relations." Effectiveness in handling the delicate problems of foreign relations requires no less. Unless such a power exists, the power of recognition might be thwarted or seriously diluted. No such obstacle can be placed in the way of rehabilitation of relations between this country and another nation, unless the historic conception of the powers and responsibilities of the President in the conduct of foreign affairs is to be drastically revised. (citations omitted)

The genesis of the 1979 agreement was the President's recognition of the GDR in 1974. The agreement establishing diplomatic relations stipulated:

> The two governments will, in supplementation of the provisions of the Vienna Convention on Diplomatic Relations and on the basis of reciprocity, accord full diplomatic privileges and immunities to those members of the administrative and technical staffs and their families who are citizens of the sending State.[3]

It is apparent that the 1979 agreement for tax exemption was ancillary to the 1974 agreement for the recognition of the GDR. Application of the principles derived from *Belmont* and *Pink* establish that the executive branch was authorized to enter into the 1979 agreement.

Our conclusion is buttressed by Section 4 of the Diplomatic Relations Act of 1978, 22 U.S.C. § 254c. This statute provides:

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[3] 25 U.S.T. 2597, 2598, T.I.A.S. No. 7937. The Vienna Convention, 23 U.S.T. 3227, T.I.A.S. No. 7502, establishes rules for the conduct of diplomatic relations. Article 34 provides that a "diplomatic agent shall be exempt from all dues and taxes, personal or real, national, regional or municipal, except ... (b) dues and taxes on private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission."

> The President may, on the basis of reciprocity and under such terms and conditions as he may determine, specify privileges and immunities for members of the mission, their families, and the diplomatic couriers of any sending state which result in more favorable treatment or less favorable treatment than is provided under the Vienna Convention.[4]

The county contends that this statute is inapplicable because it refers to privileges and immunities of individuals and not those of the foreign state which they serve.

Although the county's argument is consistent with a literal reading of the statute, we believe that Congress did not intend to limit the previously existing power of the President to deal with foreign states. Courts long have recognized that diplomatic immunity primarily serves the needs of the foreign sovereign. *See* The EXCHANGE, 11 U.S. (7 Cranch) 116, 138 (1812). The privilege extended to an individual diplomat is merely incidental to the benefit conferred on the government he represents. The legislative history of § 254c underscores this view by noting that the statute was enacted to reflect Article 47 of the Vienna Convention.[5] Section 2b of this Article provides that there is no impermissible discrimination between nations when "States extend to each other more favourable treatment than is required by the provisions of the present convention." Thus, the Convention implicitly views immunity as primarily benefitting governments rather than the individuals who serve them. The immunities conferred pursuant to § 254c, therefore, are indirectly designed to aid both foreign governments and the United States. The Act, we believe, should be construed to permit the President, or his delegate, to do directly what he is authorized to do indirectly.

We also reject the county's argument that the 1979 agreement is invalid because the note evidencing the agreement was signed by a Deputy Assistant Secretary of State instead of an

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[4] The President delegated this power to the Secretary of State by Executive Order 12101, 43 Fed. Reg. 54,195 (1978).

[5] S. Rep. No. 958, 95th Cong., 2d Sess. 5, *reprinted in* [1978] U.S. Code Cong. & Ad. News 1935, 1939.

Assistant Secretary of State. The county correctly points out that internal State Department rules indicate that such agreements are the province of Assistant Secretaries. It does not follow, however, that the agreement is invalid. The record discloses that the proposal to conclude the agreement with the GDR was brought to the attention of the Deputy Secretary of State. Clearly, as the institution of this suit demonstrates, the agreement was ratified. Under these circumstances, the presumption of official regularity in the conduct of public affairs, which has not been rebutted, is sufficient to sustain the proper execution of the agreement. *See* R. H. Stearns Co. v. United States, 291 U.S. 54, 63 (1934); United States v. Chemical Foundation, Inc., 272 U.S. 1, 14-15 (1926).

IV

The county contends that even if the 1979 agreement were authorized, it is, nevertheless, invalid. It asserts that the "Constitution does not delegate to any of the three branches of government the authority to exempt from taxation by the state real property owned by a foreign government." The county insists that exemption of a foreign government's property from state taxation is a matter of comity which Virginia in the exercise of its powers may elect to grant or deny. Proceeding with its argument, the county correctly points out that Article X, § 6 of the Virginia Constitution, which exempts certain property from taxation, does not create immunity for any property of a foreign state. These principles, the county concludes, establish that the federal government unconstitutionally infringed on its power to tax.

The starting point for consideration of the county's position is the fundamental concept that the immunity of a foreign state within the territory of another nation depends on the assent of the nation. The EXCHANGE, 11 U.S. (7 Cranch) 116, 136 (1812). In a country such as ours that contains multiple political entities, we must, therefore, determine which entity takes precedence—that is, whether the federal government's assent to immunity or the county's denial of immunity controls.

The Supreme Court has provided ample precedent for the answer to this question.

In United States v. Curtis-Wright Corp., 299 U.S. 304, 315-22 (1936), the Court explained that the power of the federal government in respect to foreign or external affairs is quite different from the limited powers conferred on it by the Constitution with respect to domestic or internal affairs. The individual colonies, the Court emphasized, never possessed international powers. Before independence, these powers were possessed by the British Crown. The Court then stated, 229 U.S. at 316:

> As a result of the separation from Great Britain by the colonies acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America.

Consequently, the Court observed, the "investment of the federal government with the powers of external sovereignty did not depend upon affirmative grants of the Constitution." 299 U.S. at 318.

The principles explained in *Curtis-Wright* were applied by the Court in United States v. Belmont, 301 U.S. 324 (1937), which involved, just as in the case presently before us, the effect to be given an agreement with a foreign state negotiated by the executive branch as an incident to this country's recognition of the foreign state. There the Court held that the law of New York could not defeat the rights created by the agreement. Expounding this theme, 301 U.S. at 331-32, the Court said:

> Plainly, the external powers of the United States are to be exercised without regard to state laws or policies. The supremacy of a treaty in this respect has been recoginzed from the beginning. . . . And while this rule in respect of treaties is established by the express language of cl. 2, Art. VI, of the Constitution, the same rule would result in the case of all international compacts and agreements from the very fact

> that complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states. . . . In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the State of New York does not exist. Within the field of its powers, whatever the United States rightfully undertakes, it necessarily has warrant to consummate. And when judicial authority is invoked in aid of such consummation, state constitutions, state laws, and state policies are irrelevant to the inquiry and decision. It is inconceivable that any of them can be interposed as an obstacle to the effective operation of a federal constitutional power.
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> . . .

Applying these precedents, we conclude that the 1979 agreement did not unconstitutionally infringe on the county's power to tax. The 1974 and 1979 agreements between the United States and the GDR must be accorded the dignity of formal treaties. The supremacy clause, Article VI, Clause 2 of the Constitution, makes them the "Law of the Land." United States v. Pink, 315 U.S. at 230; United States v. Belmont, 301 U.S. at 331. Consequently, the district court correctly ruled that with respect to taxes assessed after May 4, 1979, the United States' grant of immunity takes precedence over the county's denial of immunity.

Nevada v. Hall, 440 U.S. 410 (1979), does not require a contrary result. [6] That case and others of a similar nature cited by the county dealt with relations among the several states or between a state and the United States arising out of domestic affairs. As the Supreme Court explained, the origin and nature of these relationships are quite different from relations with foreign governments growing out of the international or external affairs of the United States.

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[6] In *Nevada v. Hall* the Court held that the question of Nevada's immunity from suit in California for an automobile accident caused by Nevada's agent was a matter of comity.

V

The United States assigns error to the district court's declaratory judgment that the county can presently enforce a tax lien against the apartment house arising out of taxes owed by the GDR for the period before May 4, 1979.

The relevant provisions of the Foreign Sovereign Immunities Act of 1976 governing execution of the property of a foreign state are codified as 28 U.S.C. §§ 1609 and 1610. Insofar as it is pertinent to this case, § 1609 states that the property "of a foreign state shall be immune from . . . execution except as provided in [section] 1610 . . ." The germane provisions of § 1610 are:

> (a) The property . . . of a foreign state . . . used for a commercial activity . . . shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—
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> . . . .
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> (2) the property is or was used for the commercial activity upon which the claim is based, or
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> . . . .
>
> (4) the execution relates to a judgment establishing rights in property—
>
> . . . .
>
> (B) which is immovable and situated in the United States: *Provided,* That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission . . . .

The legislative history recounts the background of the Act.[7] The Supreme Court formerly recognized the immunity of a foreign state's property from arrest or execution on the basis of the laws and practices of nations, which the Court perceived to be also the law of the United States. The EXCHANGE, 11 U.S. (7 Cranch) 116 (1812). This immunity was extended to the property of a foreign government engaged in a commercial enterprise. Berizzi Bros. Co. v. PESARO, 271 U.S. 562 (1926). Gradually, however, the Court relied more on the policy and practices of the State Department to determine whether immunity was appropriate. *See, e.g.*, Mexico v. Hoffman, 324 U.S. 30 (1945). Responding to the increase of commerce between Americans and foreign governments or their trading companies, the State Department in 1952 adopted a restrictive principle of sovereign immunity.[8] Congress clearly intended to adopt the State Department's policy. The House Report states:

> [T]he bill would codify the so-called "restrictive" principle of sovereign immunity, as presently recognized in international law. Under this principle, the immunity of a foreign state is "restricted" to suits involving a foreign state's public acts (jure imperii) and does not extend to suits based on its commercial or private acts (jure gestionis). This principle was adopted by the Department of State in 1952 and has been followed by the courts and by the executive branch ever since. Moreover, it is regularly applied against the United States in suits against the U.S. Government in foreign courts.[9]

The legislative history also discloses that the doctrine of restrictive immunity as embodied in the Act was not intended to deprive a foreign government's property of immunity from

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[7] H.R. Rep. No. 1487, 94th Cong., 2d Sess. 8, *reprinted in* [1976] U.S. Code Cong. & Ad. News 6604, 6606-07.

[8] The restrictive principle of sovereign immunity was outlined in the "Tate Letter," 26 Department of State Bulletin 984, *also reported at* 6 M. Whiteman, Digest of International Law 569 (1968).

[9] H.R. Rep. No. 1487, 94th Cong., 2d Sess. 7, *reprinted in* [1976] U.S. Code Cong. & Ad. News 6604, 6605.

execution when it is used for maintaining a mission. The House Report states:

> [Section 1610(a)(4)] would deny immunity from execution against property of a foreign state which is used for a commercial activity in the United States and is either acquired by succession or gift or is immovable. Specifically exempted are diplomatic and consular missions and the residence of the chiefs of such missions. This exemption applies to all of the situations encompassed by sections 1610(a) ... [E]mbassies and related buildings could not be deemed to be property used for a "commercial" activity as required by section 1610(a).[10]

The explanation given by the House Report is consistent with the Tate Letter and the Vienna Convention.[11]

The county argues that the exemption from execution provided by § 1609 is not applicable because the apartment owned by the GDR is not used "for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission" as required by § 1610(a)(4)(B). On the contrary, asserts the county, the apartment is used for commercial activity as found by the district court in the 1978 judgment in the action brought by the county against the GDR.[12] Consequently, the county maintains that execution is also proper pursuant to § 1610(a)(2).

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[10] H.R. Rep. No. 1487, 94th Cong., 2d Sess. 29 *reprinted in* [1976] U.S. Code Cong. & Ad. News 6604, 6628.

[11] *See* H.R. Rep. No. 1487, 94th Cong., 2d Sess. 20, *reprinted in* [1976] U.S. Code Cong. & Ad. News 6604, 6619.

[12] Section 1603(d) of the Act states:

> A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

Regardless of the property's use in 1977 or 1978,[13] the record discloses that from May 4, 1979, the apartment exclusively housed the members of the diplomatic, administrative, technical, and service staff of the GDR Embassy and their families. The chief of the mission, however, did not reside there.

The question therefore arises whether the provision of § 1610(a)(4)(B) exempting from execution property "used for purposes of maintaining a diplomatic or consular mission" should be interpreted to include a building used exclusively for the housing of members of the mission and their families. The Department of State has taken the position that such a building is used for maintaining a diplomatic mission. This is implicit in the 1979 agreement which assured reciprocal exemption from taxation of property "used exclusively for purposes of their diplomatic missions, including residences for the staff of their diplomatic missions and members of their families forming part of their households."

In Mexico v. Hoffman, 324 U.S. 30, 35-56 (1945), the Court pointed out that the judicial seizure of the property of a friendly state may be regarded as an affront and affect our relations with it. The Court, therefore, admonished lower courts to accept the Department's determination of immunity. The doctrine of *Mexico v. Hoffman* appears to have been modified by the Foreign Sovereign Immunities Act, which was intended to codify State Department policies rather than have them presented by the Department on a case-by-case basis. Nevertheless, we believe this litigation presents an appropriate occasion for heeding the Court's admonition.

Neither the Act nor its legislative history specifies what property is or is not "used for purposes of maintaining a diplomatic or consular mission." The views of the Department concerning the scope of this phrase, though not conclusive, are entitled to great weight. The Department is charged with

[13] We express no opinion about the use of the property during the period from its acquisition in 1976 to May 4, 1979. This is a fact that must be determined on remand.

maintaining our missions abroad and with dealing with foreign missions here. It has expertise for determining whether property is used for maintaining a mission. Only if its views are manifestly unreasonable should they be rejected. In this instance we believe the Department's views are reasonable. The property is owned by a foreign state, and presently it is used exclusively by its diplomatic and consular staff and their families. It is not operated for profit as a commercial venture. On the contrary, it serves a public function.

Undoubtedly the purchase of this property was a commercial act regardless of its purpose. Consequently, the GDR would be subject to suit under § 1605(a)(2) by the vendor if a dispute arose over the terms of sale. Referring to diplomatic and consular property, the House Report states: "[A] foreign state cannot deny to the local state the right to adjudicate questions of ownership, rent, servitudes, and similar matters, as long as the foreign state's possession of the premises is not disturbed."[14]

We cannot accept the suggestion that the commercial acquisition of the property indelibly stamps the use of the property as a commercial activity. The House Report makes this clear by explaining the dichotomy between commercial activity and a public function:

> As the definition indicates, the fact that goods or services to be procured through a contract are to be used for a public purpose is irrelevant; it is the essentially commercial nature of an activity or transaction that is critical. Thus, a contract by a foreign government to buy provisions or equipment for its armed forces or to construct a government building constitutes a commercial activity. The same would be true of a contract to make repairs on an embassy building. Such contracts should be considered to be commercial contracts, even if their ultimate object is to further a public function.[15]

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[14] *See* H.R. Rep. No. 1487, 94th Cong., 2d Sess. 20, *reprinted in* [1976] U.S. Code Cong. & Ad. News 6604, 6619.

[15] H.R. Rep. No. 1487, 94th Cong., 2d Sess. 16, *reprinted in* [1976] U.S. Code Cong. & Ad. News 6604, 6615.

We therefore conclude that § 1609 affords the GDR immunity for its apartment from execution of the tax lien and that none of the exceptions found in § 1610 are applicable.

VI

The United States also assigns error to the district court's ruling that it is estopped from litigating the issue of the tax exempt status of the property prior to May 4, 1979. The district court concluded that its 1978 judgment in the action brought by Arlington County against the GDR collaterally estopped the United States from raising the issue. The court reasoned that the United States and the GDR were in privity even though they "may have different motivation for asserting the alleged immunity."

The doctrine of collateral estoppel "has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979). Although the State Department was aware of the 1978 suit, the United States did not participate in it directly or indirectly. Consequently, to establish privity between the United States and the GDR, the county must prove that at least one of the following situations exists: "concurrent relationship to the same right of property . . . or representation of the interests of the same person." 1B Moore's Federal Practice ¶ 0.411[1] at 1255. The district court concluded that the first of these situations applied in this case. The county argues the second is also presented. We reject both these views.

The first situation described by Moore as "privity of estate" is generally reciprocal. Examples are the relationship between a trustee and the trust beneficiary or between guardian and ward. 1B Moore's Federal Practice at 1255-56. The second situation requires proof of a substantial identity of parties. 1B Moore's Federal Practice at 1255. *See* Chicago, R.I. & P. Ry. v. Schendel, 270 U.S. 611, 619-22 (1926).

Neither of these concepts describes the relationship between the United States and the GDR.

The United States had no privity of estate in the property of the GDR. It had no financial or proprietary interest in the apartment or in the assets of the GDR which would be depleted by payment of the taxes. Nor is there substantial identity of parties. Indeed, the interests of the United States and the GDR are quite distinct. The GDR sought to protect its sovereignty and pecuniary interests in the 1978 action. In contrast, the United States seeks to protect its own sovereignty, to preserve its foreign policy, and to meet its international obligations by asserting its rights under federal law. At most there exists between the United States and the GDR a contractural relationship created by the 1974 and 1979 agreements. But this relationship is insufficient to establish privity for the purposes of estoppel. *Cf.* Chase National Bank v. Norwalk, 291 U.S. 431, 438 (1934).

There is a second reason why collateral estoppel is inappropriate. Collateral estoppel "must be confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged." Commissioner v. Sunnen, 333 U.S. 591, 599-60 (1948); *see also* Montana v. United States, 440 U.S. 147, 155 (1979). Application of this principle provides an independent reason for holding that the United States is not estopped from litigating the tax status of the GDR's property prior to May 4, 1979.

After the district court decided that it had jurisdiction to adjudicate the county's suit against the GDR, the GDR stood on its plea of lack of jurisdiction and interposed no further defense. Quite understandably, the court did not address the issues the United States now raises. After hearing the county's witnesses, the court adopted the findings of fact and conclusions of law presented by the county, which dealt solely with the tax assessment, the amount of taxes that were claimed, and the county's entitlement to a tax lien under Virginia law. Based on evidence supporting these findings and conclusions, the court

entered judgment for the county and declared that the property was subject to the lien.

Undoubtedly 28 U.S.C. § 1330(a) conferred jurisdiction on the district court to determine whether the GDR was immune under "sections 1605-1607 . . . or under any applicable international agreement." Although the court considered and rejected the GDR's claim for exemption under "treaty and international law," it made no findings and stated no conclusions about the claim of the United States that it had exempted the property through agreements cognizable under the supremacy clause. Furthermore, the district court could not have considered the claim of the United States that the 1979 agreement exempted the property from the time the GDR acquired it. Also, it did not consider whether the Treaty of Friendship, Commerce, and Consular Rights with Germany, December 8, 1923, 44 Stat. 2132, T.S. No. 725, exempted the property.

Immunity under § 1605 depended on the GDR's use of the property. The county contends that the GDR never proved that the building was used to house members of the diplomatic mission and their families. From our inspection of the record of the 1978 proceeding, we find no indication that the county proved that the building was used for any other purpose. Moreover, the court does not appear to have made a specific finding about the use of the property in 1977, the tax year in question.

The existence of these issues, which were not decided in the 1978 litigation, bars application of the doctrine of collateral estoppel against the United States. Our catalog of issues does not, of course, preclude the United States from raising other issues when it litigates the tax status of the property prior to May 4, 1979.

The judgment of the district court is affirmed in part, reversed in part, and the case is remanded for further proceedings consistent with this opinion.

No. 81-1094—AFFIRMED.
No. 81-1125—REVERSED AND REMANDED.

IN THE

United States District Court for the Eastern District of Virginia

ALEXANDRIA DIVISION

Civil Action No. 80-06 67-A
[Filed November 14, 1980]

UNITED STATES OF AMERICA,
Plaintiff,

v.

COUNTY OF ARLINGTON, VIRGINIA, *et al.*,
Defendants.

ORDER

For the reasons stated from the bench, upon consideration of the cross-motions for summary judgment filed by the parties in this action, it is ADJUDGED and DECLARED that:

1. On the basis of principles of estoppel by judgment, the property known as Windsor Park Tower located at 1515 South Arlington Ridge Road, Arlington, Virginia, owned by the Government of the German Democratic Republic is subject to the lien of the real estate taxes and assessments of Arlington County, Virginia, on said property for years 1977, 1978 and until May 4, 1979, and that the taxes for those years are collectible and the lien enforceable.

2. For the period beginning May 5, 1979 and thereafter, the above described property is exempt from real property taxation by Arlington County, Virginia.

3. Except to the extent granted hereby the motion for summary judgment of the parties are denied.

/s/ ALBERT V. BRYAN, JR.
United States District Judge

Alexandria, Virginia
November 14th, 1980

IN THE

United States District Court for the Eastern District of Virginia

ALEXANDRIA DIVISION

Civil Action No. 80-0667-A

[Filed December 9, 1980]

UNITED STATES OF AMERICA,
Plaintiff,

v.

COUNTY OF ARLINGTON, VIRGINIA,
and BENNIE L. FLETCHER, JR.,
Defendants.

MEMORANDUM OPINION

On November 14, 1980, this court entered summary judgment against plaintiff for that portion of its claim covering the period January 1, 1977 through May 4, 1979, and summary judgment for plaintiff on its claims subsequent to May 4, 1979. The basis for the summary judgment against plaintiff was estoppel by prior judgment in which the issue under litigation here was resolved by this court in *County Board of Arlington County* v. *Government of German Democratic Republic,* Civil Action No. 78-293-A (E.D. Va. Sept. 7, 1978). The issue in the 1978 suit was the liability of the German Democratic Republic (GDR) for property taxes in 1977 on a building known as Windsor Park Tower located at 1515 South Arlington Ridge Road, Arlington, Virginia, owned by the GDR and used to house mission staff and their families. The court concluded that the property was subject to tax and was not immune through the operation of any United States law, treaty or existing international law.

The earlier judgment precludes the United States from raising again the question of GDR liability for the period up to May 4, 1979. On May 4, 1979, a series of letters between the United States and the GDR established an agreement based on reciprocity that the property in question would be immune from taxation. The Order of November 14, 1980, declared that from May 4, 1979, and thereafter, the property is exempt from real estate taxation by the County.

The matter is again before the court on the motion of the United States for a new trial pursuant to F. R. Civ. P. 59 on that part of the plaintiff's claims for the period before May 5, 1979. The grounds of the motion are (1) that there was no privity between the United States and the GDR to support an application of the doctrine of estoppel, and (2) even if privity existed, the judgment entered in the prior action was not a final judgment on the merits because it was a default judgment.

The court recognizes that for issue preclusion to operate against the plaintiff here, who was not a party in the prior action, privity between GDR and the United States must exist with respect to the right asserted. Although the relationship here does not fall into the more traditional classes of privity, the court believes with respect to the issue of the liability of the GDR to County taxes that privity, sufficient to ground estoppel by prior judgment, exists.

While the United States and the GDR may have different motivation for asserting the alleged immunity, the standing of the United States, which the court does not question, to bring this suit springs from the relationship between the host country and the diplomatic mission in the conduct of diplomatic business of the GDR in this country.

Privity may arise out of a concurrent relationship to the same right. *See* 1b *Moore's Federal Practice* ¶ 0.411[12]. Here the right asserted is the GDR's immunity from taxation. The relationship between the United States and the GDR with respect to this right is such to give each the concurrent privilege of asserting that right. Such a relationship establishes privity.

At the time the earlier action was brought the government concedes that the State Department's position was unclear as to the tax liability of the property in question. In fact it was possible to understand that position as expressly contrary to the one it now takes. In Department of State airgram No. CA-2770, dated October 10, 1966, then Secretary of State Rusk informed the American Embassy in Warsaw, Poland, that residential property other than the residence of the head of mission owned by a foreign government and occupied by diplomatic or consular personnel was not exempt from local real property taxation in the absence of a specific treaty. *See* October 14, 1980, deposition of Horace F. Shamwell, State Department Legal Counsel at Appendix pp. 319-320.[1] The property which is the subject of this suit is an apartment building used for the GDR staff and families and is not the residence of the head of mission.

Had the State Department wanted to correct its earlier reading of international law on the tax liability of property owned by foreign governments it could have intervened in that action as a party. This failure does not of course create any privity which does not otherwise exist. Nor is the government estopped solely by its failure to intervene. Correspondingly the government cannot deny privity on the grounds it was unaware of the earlier action since it has conceded it was aware of the controversy as early as July, 1976, and that State Department officials conferred with GDR officials about it. *See* deposition of State Department Legal Counsel Horace Shamwell at pp. 8-14.

At sometime subsequent to the 1966 airgram of Secretary Rusk the State Department changed its mind about what existing international law was or should have been.[2] However,

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[1] *See also* Defendants' Request for Admissions ¶ 14; Plaintiff's Responses to Request for Admissions ¶ 1; and Plaintiff's Memorandum of Points and Authorities in Support of the Motion for Summary Judgment, at p. 12.

[2] Although the government cites its amicus brief and the decision in the case *Republic of Argentina* v. *City of New York*, 25 N.Y. 2d 252, 303 N.Y.S. 2d 644, 250 N.E. 2d 698 (1969), as evidence of changed perception of international law, the property in question in that case was the residence of the chief of Argentinian consulate general in New York. The status of the property here is different.

it was not until November 6, 1980, after the commencement of this suit that the State Department explicitly renounced its contrary position in a letter from State Department deputy legal advisor James H. Michel to Carr Ferguson, Assistant Attorney General, Tax Division, Department of Justice. *See appendix* to Plaintiff's Memorandum and Points of Authorities in Support of Motion for Summary Judgment. Even in that letter the State Department admitted that "residential property owned by foreign States and used for housing subordinate mission personnel has sometimes ... been taxed by local jurisdiction in the United States." *Id.* at 4. Furthermore, "in the absence of an express treaty exemption the United States has not heretofore sought to compel the observance of tax exemption for foreign-government-owned real property used for housing the staff of an official mission." *Id.*

There is nothing of course improper in a party's changing its position, but the purposes behind the doctrine of collateral estoppel are to protect litigants "from the burden of relitigating an identical issue with the same party or his privy and promoting judicial economy by preventing needless litigation." *Parklane Hosiery Co.* v. *Shore,* 439 U.S. 322, 326 (1979). These purposes would be undermined by allowing the United States to relitigate an issue already decided in this court because it had changed or firmed up its opinion about the matter during the interval between the two suits.

The government also argues that even if privity did exist that the prior judgment cannot be used to collaterally estop because it was a default judgment. It is true that after contesting the court's jurisdiction in the prior action, the GDR interposed no further defense. This of course was because the jurisdictional issue was the only real issue in the case. The GDR had claimed it was immune from suit under 28 U.S.C. § 1605. There was never any serious question concerning the amount of the tax assessment, the ownership of the property, or

that the tax was unpaid. The issue of jurisdiction was vigorously contested, and to say that the prior action was a default judgment is not correct.

Accordingly the motion for a new trial will be denied.

/s/ ALBERT V. BRYAN, JR.
United States District Judge

Alexandria, Virginia
December 9th, 1980

IN THE

United States District Court for the Eastern District of Virginia

ALEXANDRIA DIVISION

Civil Action No. 80-0667-A

[Filed December 9, 1980]

UNITED STATES OF AMERICA,
Plaintiff,

v.

COUNTY OF ARLINGTON, VIRGINIA,
and BENNIE L. FLETCHER, JR.,
Defendants.

ORDER

For the reasons set forth in the Memorandum Opinion this day filed, it is hereby

ORDERED that the Motion for a New Trial of the United States is denied. The court further orders that the record in Civil Action No. 78-293-A be made a part of the record in this action.

/s/ ALBERT V. BRYAN, JR.
United States District Judge

Alexandria, Virginia
December 9th, 1980

BENCH OPINION

November 14, 1980

(Begin Transcript page 31)

THE COURT: I recognize the difference in interest asserted by the United States in this case than perhaps the interest that was asserted by East Germany in the prior action.

Nevertheless, I think that the issue which the Court has to resolve, that is, the liability of East Germany and its property for taxes for certain years, was an issue that was decided in the prior case. And whether you call it res judicata or probably more estoppel since the parties here are not the same as the parties there, the issue of the liability of East Germany for its taxes and its property and whether its property is subject to the lien for real estate taxes of Arlington County was decided in that case.

And I don't think the government, the federal government can in a subsequent case assert new interest that it has in harmonious international relations and the law of (Begin Transcript page 32) nations relitigate that case. And that's what is sought to be done here.

So I'm not going to relitigate what the international custom and usage and law was prior to May 4, 1979, because I think that has been established.

And to that extent the defendants' motion for summary judgment or to dismiss is granted.

The agreement, however, that the defendant attacks, which was effective on May 4, 1979, is in my view a valid agreement entered into pursuant to powers validly delegated to the State Department.

I don't think the fact that it removes certain lands from the county tax roles lends it—makes it unconstitutional. And I think that it creates an exempt status as of May 4, 1979, but not retroactively for the property of East Germany used for the purpose that this property is used for.

Consequently, I find that the property is exempt on May 4, 1979, and thereafter, is not exempt prior to May 4, 1979.

I think that the creation of an exempt status for it as of that date allows the liability of the property for those taxes to be allocated for the first four months and four days of 1979 to the owner of it.

The collectability of those taxes for the (Begin Transcript page 33) periods that the Court in its prior judgment found it, found the property liable, and for the years thereafter up to May 4, 1979, is a separate issue. But I see no reason why the collectability of that, of those taxes for which the Court has found the property liable, should not be—I can't see any reason why it should be enjoined or stopped.

I think the practical problems of trying to effect execution or sale of that land is probably going to take care of whether the property can be sold. But I'm not going to say that those taxes are not collectable for the years '77, '78 and '79 up through May 4, 1979.

So while I would be inclined to follow my previous decision on the basis of stare decisis, I don't think I have the luxury of doing that. I think principles of estoppel preclude relitigation for those years of the tax liability of East Germany for those taxes and the liability of the land.

For these reasons, the motion of the defendant to dismiss is granted in part and denied in part.

And the motion of the government is granted in part and denied in part.

I'll prepare the order on it.

IN THE

United States District Court for the Eastern District of Virginia

ALEXANDRIA DIVISION

Civil Action No. 78-293-A

COUNTY BOARD OF ARLINGTON COUNTY,
Plaintiff,

v.

THE GOVERNMENT OF THE GERMAN DEMOCRATIC REPUBLIC
Defendant.

PLAINTIFF'S PROPOSED FINDINGS OF FACT

1. On January 1, 1977 up until the present time, the defendant, the Government of the German Democratic Republic (GDR), was the owner of the property subject to this action, known as "Windsor Park Tower" and located at 1515 South Arlington Ridge Road, Arlington, Virginia (referred to as the "subject property").

2. The subject property is an eight story apartment building containing thirty residential dwelling units.

3. The fair market value of the subject property as of January 1, 1977, was $1,612,700.

4. The Arlington County Department of Real Estate Assessments, pursuant to legal authority, assessed the subject property for local *ad valorem* real estate tax purposes for the 1977 tax year at $1,612,700.

5. The Department of Real Estate Assessments of Arlington County, pursuant to legal authority and based on the tax rate of $1.49 for each $100 of assessed value, determined the 1977 tax to be $24,029.23 and such assessment was charged to the defendant in the County land records. The Treasurer of

Arlington County rendered statements to the defendant for each installment payment of this tax for 1977, as well as determining the penalties and interest as a result of the failure to pay, which were sent to the address of the agent of the taxpayer as provided by GDR. The first tax installment payment due and payable on May 16, 1977 was $12,192.01 and the second tax installment payment due and payable on October 17, 1977 was $11,837.22.

6. The 1977 real estate taxes on the subject property have not been paid and GDR refuses to pay the tax as well as any penalty or interest.

7. The penalty for late payment of the tax in this case is ten percent of the tax due for 1977 or $2,402.92.

8. The interest due upon all late payments is at the rate of eight percent per year computed from June 1, 1977 to the time of payment as to the first installment and, as to the second installment, from November 1, 1977.

PLAINTIFF'S PROPOSED CONCLUSIONS OF LAW

1. All property in Virginia, except as expressly provided for in the Virginia Constitution, is required to be taxed and the assessments of real estate are at fair market value. Va. Const., Art. X, §§1 and 2.

2. All taxable real estate located in Arlington County is subject to local *ad valorem* taxation as prescribed by state law. Va. Const., Art. X, § 4; Va. Code Ann. § 58-758 *et seq.*, as amended.

3. The subject property is not exempted from local *ad valorem* taxation under any provision of Virginia law. Va. Const., Art. X., § 6; Va. Code Ann. § 58-12, as amended.

4. The *ad valorem* taxes assessed on local real estate constitute a lien upon the real estate or rents received from such realty, prior to any other lien or encumbrance. Va. Code Ann. § 58-1022 *et seq.*, as amended.

5. The owner of real property on January first of each tax year is assessed and chargeable for the taxes for the year beginning on that date. Va. Code Ann., § 58-796 as amended; 1961-62 Op. Va. Att'y Gen. 256-57.

6. The taxes assessed upon real property in Virginia are also a personal liability of the owner on January first and the obligation may be enforced as any other *in personam* action. Va. Code Ann., § 58-1014 as amended; *Pollard & Bagby, Inc.*, v. *City of Richmond,* 181 Va. 181, 24 S.E.2d 564 (1943); see also, *In re Polumbo,* 271 F. Supp. 640 (W.D. Va. 1967).

7. The local real estate taxes were duly levied, the subject property was duly assessed for the 1977 tax year by the Arlington County Department of Real Estate Taxation and such assessment was duly charged to the defendant in the County land records. See Va. Code Ann. § 58-806 as amended; § 58-960 as amended.

8. The subject property was duly assessed at $1,612,700 for 1977. The tax rate for 1977 was $1.49 per one hundred dollars of assessed value.

9. The defendant, GDR, is personally liable to the County for both installments of the 1977 real estate tax. The amount due for the first installment of 1977 is $12,192.01 for the tax, $1,219.20 for the penalty (10%) and interest of eight percent per annum upon the total of the unpaid tax and penalty computed from June 1, 1977 until the date of payment; the amount due for the second installment of 1977 is $11,837.22 for the tax and $1,183.72 for the penalty (10%) and interest of eight percent per annum upon the total of the unpaid tax and penalty computed from November 1, 1977 until the date of payment. This unpaid tax, penalty and interest has been a lien upon the subject property, and rents derived therefrom, prior to all other liens from the date the tax was delinquent and it will continue to be a lien until the tax, penalty and interest are paid.

Arlington County Code § 20-B; Va. Code Ann. § 58-762, as amended.

COUNTY BOARD OF ARLINGTON COUNTY

By Counsel

IN THE

United States District Court for the Eastern District of Virginia

ALEXANDRIA DIVISION

Civil Action No. 78-293-A

COUNTY BOARD OF ARLINGTON COUNTY,
Plaintiff,

v.

THE GOVERNMENT OF THE GERMAN DEMOCRATIC REPUBLIC, *et al.*,
Defendants.

ORDER

The defendant Government of the German Democratic Republic (the "government"), owner of an apartment building in Arlington County, moved to dismiss the action for 1977 county real estate taxes on the building brought by the plaintiff County Board of Arlington County, Virginia (the "county") pursuant to Rule 12(b) of the Federal Rules of Civil Procedure and by its Notice of Motion and Statement of Points and Authorities asserted that the Court has no jurisdiction over the person of the defendant government because there was no service of process under 28 U.S.C. § 1608(a) and that the Court has no jurisdiction of the subject matter of the action because the defendant government is immune from a suit for real property taxes on the immovable property subject to the action under the Foreign Sovereign Immunities Act (28 U.S.C. § 1602, et seq.), and is also immune under Articles 23 and 34(b) of the Vienna Convention as well as "under recognized principles of international law." The defendant government treated these two questions as motions under Rule 12(b)(1), (2), (4), (5), and (6).

This motion to dismiss was heard on August 4, 1978, and on that day the plaintiff county also moved that the Court allow an amendment of its Motion for Judgment to add a request for a declaratory judgment that the real property known as "Windsor Park Towers" is subject to the lien of the County provided for in Va. Code Ann. § 58-762 as to the delinquent 1977 ad valorem real estate tax, penalty and interest. The County also moved the Court to shorten the time for the defendant government to answer its Request for Admissions and First Set of Interrogatories to August 11, 1978.

It appears that service has been made under 28 U.S.C. § 1608(a)(3) by mailing of the documents certified as mailed by the Clerk of the Circuit Court of Arlington County, Virginia, on May 1, 1978, before the action was removed to this Court under 28 U.S.C. § 1441(d) and received by the Foreign Minister of the defendant government on May 8, 1978, as evidenced by the copy of the return receipt previously filed. The Court concludes that service has been made under 28 U.S.C. §1608(a)(3) and overrules objections to the jurisdiction over the person of the defendant government, the objections to the process and service of process.

It also appears that the nature of the course of conduct being carried on by the defendant government in its ownership of the immovable property subject to this action is commercial in character and the nature of the course of the conduct determines whether or not the activity is commercial, rather than its purpose. The action also places in issue rights in immovable property situated in the United States. Whether or not the issue of rights in immovable property is present under the original pleadings, after the amendment of pleadings being allowed below, the issue will be a specific matter for the Court's attention in determining the question of the county's lien under § 58-762 of the Va. Code Ann. The Court, therefore, concludes that the defendant government, as a foreign state, is not immune from the jurisdiction of this Court because this is a case falling under 28 U.S.C. § 1605(a)(2) and it is also a case falling under 28 U.S.C. § 1605(a)(4).

The Court concludes that the defendant government's argument that it is exempt from local real property taxation under treaty and international law must fail.

It appears that a parallel question to be considered in the plaintiff county's claim for a judgment for 1977 real property taxes will be the question of the lien for those taxes. The Court concludes that the amendment should be granted.

Finally, it appears that the defendant should be given thirty days to respond to the Request for Admissions and First Set of Interrogatories; and accordingly, the cut-off date for discovery established by the pre-trial order is extended to allow the response to the discovery requested by the plaintiff county of the defendant government prior to August 4, 1978, to be made within the thirty days after service as provided for by the Rules.

For the foregoing reasons, the Court denies the Defendant government's motion to dismiss made pursuant to Rules 12(b)(1), (2), (4), (5), and (6), grants the plaintiff county's motion for leave to amend, denies the county's motion to shorten the time for responding to discovery, and extends the time for completing discovery by allowing responses to the Request for Admissions and First Set of Interrogatories, previously filed, to be made after August 11, 1978, and on the date required for responses by the Federal Rules of Civil Procedure and the local rules.

And it is so ordered.

/s/ ALBERT V. BRYAN, JR.
United States District Judge

Alexandria, Virginia
Dated: 9/6/78

IN THE

United States District Court for the Eastern District of Virginia

ALEXANDRIA DIVISION

CIVIL ACTION
NO. 78-293-A

COUNTY BOARD OF ARLINGTON COUNTY,
Plaintiff,

v.

THE GOVERNMENT OF THE GERMAN DEMOCRATIC REPUBLIC,
Defendant.

ORDER

This case was heard by the Court on September 7, 1978, at which time the Court heard the evidence of the plaintiff's witnesses, James R. Vinson, the Director of Real Estate Assessments of Arlington County, and Bennie L. Fletcher, Jr., the Treasurer of Arlington County. The defendant presented no evidence.

After hearing evidence and giving counsel opportunity to be heard, the Court finds that the plaintiff's proposed findings of fact and conclusions of law should be adopted as its findings and conclusions, and finds that the defendant is indebted to the plaintiff in the amount stated in the findings, $13,411.21, with interest at 8% from June 1, 1977, and $13,020.94, with interest at 8% from November 1, 1977, and finds that the defendant should be ordered to pay these amounts to the plaintiff.

The Court also finds that the declaratory judgment asked for by the plaintiff should be granted.

And it is so ordered.

The Court notes the objections and exceptions of the defendant.

/s/ ALBERT V. BRYAN, JR.
United States District Judge

Alexandria, Virginia
September 7th, 1978

AGREEMENT OF MAY 4, 1979

The Department of State acknowledges the receipt of Note 63/1979 of the Embassy of the German Democratic Republic dated May 4, 1979 and wishes to inform the Embassy that, on the basis of that note and the Department's note of April 16, 1979, an agreement exists between the Government of the United States of America and the Government of the German Democratic Republic with regard to the reciprocal exemption from real estate taxes for property owned, now or in the future, by the Government of the German Democratic Republic and by the Government of the United States, when such property is used exclusively for purposes of their diplomatic missions, including residences for the staff of their diplomatic missions and members of their families forming part of their households. The effective date of said agreement is May 4, 1979.

Department of State,

June 8, 1979

Washington,

Drafted by: EUR/CE:VSGray:bjr
06/06/79:ext 22721

Clearances:
EUR—Mr. Goodby
EUR/CE—Mr. Miles
L/M—Mr. Shamwell
S/CPR—

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

At Richmond

No. 81-1094

UNITED STATES OF AMERICA,

Appellee,

-v-

COUNTY OF ARLINGTON, VIRGINIA,

Appellant

and

BENNIE L. FLETCHER, JR.,
Treasurer of the County of
Arlington, Virginia,

Defendant.

No. 81-1125

UNITED STATES OF AMERICA,

Appellant,

-v-

COUNTY OF ARLINGTON, VIRGINIA
and BENNIE L. FLETCHER, JR.,
Treasurer of the County of
Arlington, Virginia,

Appellees.

NOTICE OF APPEAL

[Filed April 22, 1982]

The party taking this appeal is Arlington County, Virginia, the defendant below. Bennie L. Fletcher, Jr. was also a defendant below. The County appeals the judgment of the United States Court of Appeals for the Fourth Circuit, entered on February 1, 1982. This appeal is taken pursuant to 28 U.S.C. § 1254(2) within the time permitted by 28 U.S.C. § 2101 and the Rules of this Court.

COUNTY OF ARLINGTON, VIRGINIA
BENNIE L. FLETCHER, JR.

By Counsel

CHARLES G. FLINN

Charles G. Flinn
Acting County Attorney

DAVID R. LASSO

David R. Lasso
Assistant County Attorney
1400 N. Courthouse Rd., #106
Arlington, Virginia 22201
(703) 558-2705
Counsel for County of Arlington, Virginia, and Bennie L. Fletcher, Jr.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Notice of Appeal was mailed, postage prepaid, to Hon. Elsie Munsell, United States Attorney, 117 South Washington Street, Alexandria, Virginia 22314, and to Rex Lee, Solicitor General, Department of Justice, Washington, D.C. 20530, on this 20th day of April, 1982.

CHARLES G. FLINN

Diplomatic Relations Act (1978)

22 U.S.C.

§254a. Definitions

As used in sections 254a to 254e of this title—

(1) the term "members of a mission" means—

(A) the head of a mission and members of the diplomatic staff of a mission,

(B) members of the administrative and technical staff of a mission, and

(C) members of the service staff of a mission,

as such terms are defined in Article 1 of the Vienna Convention;

(2) the term "family" means—

(A) the members of the family of a member of a mission described in paragraph (1)(A) who form part of his or her household if they are not nationals of the United States, and

(B) the members of the family of a member of a mission described in paragraph (1)(B) who form part of his or her household if they are not nationals or permanent residents of the United States,

within the meaning of Article 37 of the Vienna Convention;

(3) the term "mission" includes missions within the meaning of the Vienna Convention and any missions representing foreign governments, individually or collectively, which are extended the same privileges and immunities, pursuant to law, as are enjoyed by missions under the Vienna Convention; and

(4) the term "Vienna Convention" means the Vienna Convention on Diplomatic Relations of April 18, 1961 (T.I.A.S. numbered 7502; 23 U.S.T. 3227), entered into force with respect to the United States on December 13, 1972.

P. L. 95-393. § 2. Sept. 30, 1978, 92 Stat. 808.

§254b. Privileges and immunities of members of mission of state not ratifying Vienna Convention

Members of the mission of a sending state which has not ratified the Vienna Convention, their families, and the diplomatic couriers of such state, shall enjoy the privileges and immunities specified in the Vienna Convention.

Pub.L. 95-393, § 3(b), Sept. 30, 1978, 92 Stat. 808.

Historical Note

Effective Date. Section effective at the end of the 90-day period beginning on Sept. 30, 1978, see section 0 of Pub.l. 95-393, set out as a note under section 254a of this title.

Legislative History. For legislative history and purpose of Pub.l. 95-393, see 1978 U.S.Code Cong. and Adm.News, p. 1935.

§254c. Extension of more favorable or less favorable treatment than provided under Vienna Convention; authority of President

The President may, on the basis of reciprocity and under such terms and conditions as he may determine, specify privileges and immunities for members of the mission, their families, and the diplomatic couriers of any sending state which result in more favorable treatment or less favorable treatment than is provided under the Vienna Convention.

Pub.L. 95-393, § 4, Sept. 30, 1978, 92 Stat. 809.

Historical Note

Effective Date. Section effective at the end of the 90-day period beginning on Sept. 30, 1978, see section 9 of Pub.L. 95-393, set out as a note under section 254a of this title.

Legislative History. For legislative history and purpose of Pub.L. 95-393, see 1978 U.S.Code Cong. and Adm.News, p. 1935.

§254d. Dismissal on motion of action against individual entitled to immunity

Any action or proceeding brought against an individual who is entitled to immunity with respect to such action or proceeding under the Vienna Convention on Diplomatic Relations, under section 254b or 254c of this title, or under any other laws extending diplomatic privileges and immunities, shall be dismissed. Such immunity may be established upon motion or suggestion by or on behalf of the individual, or as otherwise permitted by law or applicable rules of procedure.

Pub.L. 95-393, § 5, Sept. 30, 1978, 92 Stat. 809.

Historical Note

Effective Date. Section effective at the end of the 90-day period beginning on Sept. 30, 1978, see section 9 of Pub.L. 95-393, set out as a note under section 254a of this title.

Legislative History. For legislative history and purpose of Pub.L. 95-393, see 1978 U.S.Code Cong. and Adm.News, p. 1935.

§254e. Liability insurance for members of mission

Compliance with regulations promulgated by President

(a) Each mission, members of the mission and their families, and individuals described in section 19 of the Convention on Privileges and Immunities of the United Nations of February 13, 1946, shall comply with any requirement imposed by the regulations promulgated by the President pursuant to subsection (b) of this section.

* * *

FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976
§§ 1603-1610
28 U.S.C.

§ 1603. *Definitions*

For purposes of this chapter—

(a) A "foreign state," except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

* * *

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

§ 1604. *Immunity of a foreign state from jurisdiction*

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§ 1605. *General exceptions to the jurisdictional immunity of a foreign state*

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

§ 1609. *Immunity from attachment and execution of property of a foreign state*

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

§1610. *Exceptions to the immunity from attachment or execution*

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property—

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided,* That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes, April 18, 1961, 23 U.S. Treaties 3227—

VIENNA CONVENTION ON DIPLOMATIC RELATIONS

The State Parties to the present Convention,

Recalling that peoples of all nations from ancient times have recognized the status of diplomatic agents,

Having in mind the purpose and principles of the Chapter of the United Nations [1] concerning the sovereign equality of States, the maintenance of international peace and security, and the promotion of friendly relations along nations,

Believing that an international convention on diplomatic intercourse, privileges and immunities would contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems,

Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States,

Affirming that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention,

Have agreed as follows:

ARTICLE 1

For the purpose of the present Convention, the following expressions shall have the meaning hereunder assigned to them:

* * *

(i) the "premises of the mission" are the buildings or parts of buildings and the land ancillary thereto, irrespective of

[1] TS 993; 59 Stat. 1031.

ownership, used for the purposes of the mission including the residence of the head of the mission.

* * *

ARTICLE 23

1. The sending State and the head of the mission shall be exempt from all national, regional or municipal dues and taxes in respect to the premises of the mission, whether owned or leased, other than such as represent payment for specific services rendered.

* * *

ARTICLE 34

A diplomatic agent shall be exempt from all dues and taxes, personal or real, national, regional or municipal, except:

* * *

(b) dues and taxes on private immovable property situated in the territory of the receiving State, unless he holds ... on behalf of the sending State for the purposes of the mission;

* * *

ARTICLE 47

1. In the application of the provisions of the present Convention, the receiving State shall not discriminate as between States.

2. However, discrimination shall not be regarded as taking place:

(a) where the receiving State applies any of the provisions of the present Convention restrictively because of a restrictive

application of that provision to its mission in the sending State;

(b) where by custom or agreement States extend to each other more favourable treatment than is required by the provisions of the present Convention.

VIRGINIA CONSTITUTION

ARTICLE X

§ 4. Property segregated for local taxation; exceptions.—Real estate, coal and other mineral lands, and tangible personal property, except the rolling stock of public service corporations, are hereby segregated for, and made subject to, local taxation only, and shall be assessed for local taxation in such manner and at such times as the General Assembly may prescribe by general law.

* * *

§ 6. Exempt property.—(a) Except as otherwise provided in this Constitution, the following property and no other shall be exempt from taxation, State and local, including inheritance taxes:

(1) Property owned directly or indirectly by the Commonwealth or any political subdivision thereof, and obligations of the Commonwealth or any political subdivision thereof exempt by law.

(2) Real estate and personal property owned and exclusively occupied or used by churches or religious bodies for religious worship or for the residences of their ministers.

(3) Private or public burying grounds or cemeteries, provided the same are not operated for profit.

(4) Property owned by public libraries or by institutions of learning not conducted for profit, so long as such property is primarily used for literary, scientific, or educational purposes or purposes incidental thereto. This provision may also apply to leasehold interests in such property as may be provided by general law.

(5) Intangible personal property, or any class or classes thereof, as may be exempted in whole or in part by general law.

(6) Property used by its owner for religious, charitable, patriotic, historical, benevolent, cultural, or public park and

playground purposes, as may be provided by classification or designation by a three-fourths vote of the members elected to each house of the General Assembly and subject to such restrictions and conditions as may be prescribed.

(7) Land subject to a perpetual easement permitting inundation by water as may be exempted in whole or in part by general law.

(b) The General Assembly may by general law authorize the governing body of any county, city, town, or regional government to provide for the exemption from local real property taxation, or a portion thereof, within such restrictions and upon such conditions as may be prescribed, of real estate owned by, and occupied as the sole dwelling of, persons not less than sixty-five years of age or persons permanently and totally disabled as established by general law who are deemed by the General Assembly to be bearing an extraordinary tax burden on said real estate in relation to their income and financial worth.

(c) Except as to property of the Commonwealth, the General Assembly by general law may restrict or condition, in whole or in part, but not extend, any or all of the above exemptions.

(d) The General Assembly may define as a separate subject of taxation any property, including real or personal property, equipment, facilities, or devices, used primarily for the purpose of abating or preventing pollution of the atmosphere or waters of the Commonwealth or for the purpose of transferring or storing solar energy, and by general law may allow the governing body of any county, city, town, or regional government to exempt or partially exempt such property from taxation, or by general law may directly exempt or partially exempt such property from taxation.

(e) The General Assembly may define as a separate subject of taxation household goods, personal effects and tangible farm property and products, and by general law may allow the governing body of any county, city, town, or regional government to exempt or partially exempt such property from

taxation, or by general law may directly exempt or partially exempt such property from taxation.

(f) Exemptions of property from taxation as established or authorized hereby shall be strictly construed; provided, however, that all property exempt from taxation on the effective date of this section shall continue to be exempt until otherwise provided by the General Assembly as herein set forth.

(g) The General Assembly may by general law authorize any county, city, town, or regional government to impose a service charge upon the owners of a class or classes of exempt property for services provided by such governments.

(h) The General Assembly may by general law authorize the governing body of any county, city, town, or regional government to provide for a partial exemption from local real property taxation, within such restrictions and upon such conditions as may be prescribed, of real estate whose improvements, by virtue of age and use, have undergone substantial renovation, rehabilitation or replacement.

§ 58-758. Application of chapter.—All taxable real estate having been segregated by law for local taxation only, such taxable real estate shall be assessed for local taxation in accordance with the provisions of this chapter and other provisions of law. For the purposes of this chapter, and other provisions of law relating to the assessment of real estate for taxation the term "taxable real estate" shall include a leasehold interest in every case in which the land or improvements, or both, as the case may be, are exempt from assessment for taxation to the owner. This chapter shall not apply to the assessment of any real estate assessable under the law by the State Corporation Commission.

This section, as hereby amended, shall apply to the tax year beginning January one, nineteen hundred and fifty-five, and to every tax year thereafter until otherwise provided by law. (1928, p. 168; Tax Code, § 241; 1954, c. 317.)

* * *

§ 58-762. Lien on real estate for taxes and levies assessed thereon; responsibility of purchaser at deed of trust sale; lien on rents.—There shall be a lien on real estate for the payment of taxes and levies assessed thereon prior to any other lien or encumbrance thereon. The lien shall continue to be such prior lien until actual payment shall have been made to the proper officer of the taxing authority. The purchaser at a sale under a deed of trust shall see that the proceeds are applied to the payment of all taxes and levies assessed on real estate, the provisions of § 55-59.4 to the contrary notwithstanding. The words "taxes" and "levies" as used in this section include the penalties and interest accruing on such taxes and levies in pursuance of law. The lien imposed hereby shall, in addition to existing remedies for the collection of taxes and levies, be enforceable by suit in equity, instituted and conducted at the direction of the board of supervisors or other governing body of the county or the council of the city or town in which such taxes

and levies are assessed, by such attorney as such board, council or other governing body may employ for the purpose, under the provisions of article 8 of chapter 21 (§ 58-1117.1 et seq.).

There shall be a further lien upon the rents of such real estate whether the same be in money or in kind, for taxes of the current year. (Code 1919, § 2271; 1924, p. 589; 1928, p. 171; 1930, p. 872; 1938, p. 426; 1940, p. 665; Tax Code, § 251; 1973, c. 467; 1979, c. 12.)

United States Court Of Appeals

For The Fourth Circuit

February 1, 1982

To:

Charles G. Flinn, Esq.
David R. Lasso, Esq.

George P. Williams, Esq.

John F. Murray, Esq.
Michael L. Paup, Esq.
David E. Carmack, Esq.
John J. McCarthy, Esq.

NOTICE OF JUDGMENT

Judgment was entered in Case No. 81-1904 & 81-1125 this date.

The Court's opinion is enclosed.

* * *

WILLIAM K. SLATE, II
CLERK

Motion to Affirm

Office - Supreme Court, U.S.
FILED
JUN 24 1982
STEVAS,
CLERK

No. 81-2019

In the Supreme Court of the United States

OCTOBER TERM, 1981

COUNTY OF ARLINGTON, VIRGINIA, APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION TO AFFIRM

REX E. LEE
Solicitor General

GLENN L. ARCHER, JR.
Assistant Attorney General

DAVID ENGLISH CARMACK
JOHN J. MCCARTHY
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the United States has the constitutional authority to exempt from nondiscriminatory local real property taxes a building owned by a foreign government and used to house its diplomats.

2. Whether the United States has validly exercised its constitutional authority to exempt, after May 4, 1979, the building upon which appellant seeks to impose real property taxes.

3. Whether the real property in question is immune from execution to satisfy a judgment for taxes entered on September 7, 1978, under either 28 U.S.C. 1609 and 1610, an agreement between the United States and the German Democratic Republic, or any other statute or treaty.

4. Whether a judgment entered on September 7, 1978, in favor of appellant against the German Democratic Republic bars the United States under collateral estoppel from litigating the taxable status of the building in question for periods prior to May 4, 1979.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-2019

COUNTY OF ARLINGTON, VIRGINIA, APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION TO AFFIRM

Pursuant to Rule 16.1 of the Rules of this Court, the United States of America moves that the judgment of the United States Court of Appeals for the Fourth Circuit be affirmed.

OPINIONS BELOW

The district court's bench opinion and order on cross-motions for summary judgment (J.S. App. 20a-21a, 28a-29a) and its memorandum opinion and order on motion for new trial (J.S. App. 22a-26a, 27a) are not officially reported. The opinion of the court of appeals (J.S. App. 1a-19a) is reported at 669 F. 2d 925.

JURISDICTION

The judgment of the court of appeals was entered on February 1, 1982 (J.S. App. 54a). The notice of appeal was filed on April 22, 1982 (J.S. App. 39a-40a). The jurisdictional statement was filed with the Court on April 30, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(2).

CONSTITUTIONAL PROVISIONS, STATUTES AND TREATIES INVOLVED

Constitution of the United States:

ARTICLE II

Section 1. The executive Power shall be vested in a President of the United States of America. * * *

Section 2. * * *

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls * * *.

Section 3. * * *[H]e shall receive Ambassadors and other public Ministers; * * *

ARTICLE VI

* * * * *

This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * * * *

The relevant provisions of Section 4 of the Diplomatic Relations Act, Pub. L. No. 95-393, 92 Stat. 808 (22 U.S.C. (Supp. III) 254c), of 28 U.S.C. 1603, 1604, 1605, 1609 and 1610, of Arts. 1, 23, 34 and 47 of the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, of the Agreement between the United

States and the German Democratic Republic, effective May 4, 1979, 30 U.S.T. 5751, T.I.A.S. No. 9522, of Sections 4 and 6 of Art. X of the Virginia Constitution, and pertinent parts of Section 58 of the Va. Code (Rep. 1974) are set forth at J.S. App. 38a, 41a-54a.

STATEMENT

On September 4, 1974, the United States and the German Democratic Republic (GDR) executed an Agreement on Diplomatic Relations (25 U.S.T. 2597, T.I.A.S. No. 7937) in which they agreed (1) to establish diplomatic relations and exchange diplomatic and consular missions, and (2) to accord, on a reciprocal basis, the other country's mission full diplomatic privileges and immunities in accordance with the Vienna Convention on Diplomatic Relations of Apr. 18, 1961. Thereafter, the GDR established a diplomatic mission in the United States and, in the course of so doing, purchased on July 28, 1976, a multi-unit apartment building located in Arlington County, Virginia (J.S. 5). Since its purchase, this property has been used exclusively to house members of its diplomatic mission and their families, excluding only the Chief of the Mission and his family[1] (J.S. App. 2a, 15a).

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[1] Appellant County of Arlington, Virginia argues (J.S. 5, n.3) that the record does not support the court of appeals' conclusion (J.S. App. 15a) "that [r]egardless of the property's use in 1977 or 1978, [footnote omitted] the record discloses that from May 4, 1979, the apartment exclusively housed the members of the diplomatic, administrative, technical, and service staff of the GDR Embassy and their families." But appellant in effect conceded this point in the trial court by contending that the United States' suit was barred by collateral estoppel. In the suit between appellant and the GDR, the GDR offered an uncontested affidavit and a verified answer attesting that since its purchase by the GDR, the building in question was used exclusively to house members of its diplomatic staff (A. 240-251). The trial court held, however, that the GDR's use of the realty was commercial in character and that accordingly this property and the GDR were subject to suit (A. 44-47). In this suit, appellant moved to dismiss the complaint of the United

In 1977, appellant assessed an ad valorem real property tax with respect to this building for the tax year 1977. In 1978, appellant brought suit against the GDR seeking a judgment in the amount of those taxes and for a declaration that it had a tax lien on this realty. The GDR removed that action to the United States District Court for the Eastern District of Virginia, and filed an answer alleging that it was making a special appearance to contest the court's jurisdiction. The GDR moved to dismiss the complaint on the ground, *inter alia*, that the court lacked jurisdiction over it and over the subject matter because the GDR was a foreign state and because its property used for housing its diplomats was immune from real property taxes. The district court rejected these jurisdictional defenses. Since the GDR interposed no further defenses to appellant's complaint, the court entered judgment in favor of appellant against the GDR for the taxes (J.S. App. 2a-3a; A. 44-47, 232, 235-239, 250).

States for tax periods both prior and subsequent to May 4, 1979, on grounds of collateral estoppel by virtue of the September 7, 1978, order entered in the earlier suit (A. 19-20, 69-70, 72). In advancing the collateral estoppel argument for tax periods prior to May 4, 1979, appellant necessarily conceded that there had been no material change of facts since the earlier suit, *i.e.*, the realty was still used to house GDR diplomats. With reference to the tax periods after May 4, 1979, appellant contended that the only new issue was the validity of the May 4, 1979, agreement (*i.e.*, the use of the property remained the same) and since that agreement was invalid, collateral estoppel still pertained to periods after May 4, 1979 (A. 73, 125-126, 134).

Further, in moving to dismiss and in oral argument before the district court, appellant admitted these collateral estoppel issues were the only issues (A. 70-73; 125-127). Appellant further acknowledged that even if it prevailed in asserting its tax claim, it would have trouble evicting the diplomats living in the taxed premises because of their diplomatic immunity (A. 128-129). In addition, State Department memoranda concerning this tax dispute between appellant and the GDR confirm that the GDR used the premises to house its diplomats (A. 81, 192, 197).

Thereafter, the GDR entered into further negotiations with the United States that culminated in the execution of another agreement between the United States and the GDR, effective as of May 4, 1979. That agreement specifically provided, on a reciprocal basis, for an exemption from real estate taxes for property owned by one government in the territory of the other and used exclusively for purposes of its diplomatic mission, including residences for the staff of its diplomatic mission and members of their families (J.S. App. 3a-4a).

Despite this agreement, appellant continued to tax the property. At the request of the Department of State, the Attorney General filed this action in the United States District Court for the Eastern District of Virginia, seeking (1) a declaratory judgment that the property was exempt from tax from the time the GDR purchased it; (2) the voiding of all of appellant's assessments and tax liens against the realty; and (3) an injunction prohibiting appellant from further attempting to collect taxes from the property or the GDR. The district court held that the United States was estopped by the earlier judgment from contesting the taxes assessed from periods prior to May 4, 1979, that the realty in question was subject to an enforceable lien securing payment of the taxes previously adjudged to be due, and that beginning May 5, 1979, the real property in question was exempt from taxation by the appellant (J.S. App. 4a, 20a-29a).

On cross-appeals by appellant and the United States, the court of appeals decided that (1) the United States had standing to bring this action to enforce its treaty with the GDR without naming the GDR as a party; (2) the May 4, 1979, agreement between the United States and the GDR was a constitutionally authorized act by the Executive Branch of the United States Government in the conduct of

its diplomatic relations with the GDR that overrode Arlington County's denial of tax immunity for time periods subsequent to May 4, 1979; (3) the property was immune under 28 U.S.C. 1609 and 1610, from execution of appellant's tax lien for taxes adjudged to be due prior to May 4, 1979; and (4) the judgment entered on September 7, 1978, did not bar the United States under collateral estoppel from litigating both the tax status of the realty for the periods prior to May 4, 1979, and the question whether the United States was entitled to a declaratory judgment that the realty was immune from taxation from its acquisition by the GDR in 1976 (J.S. App. 19a).[2]

ARGUMENT

The court of appeals correctly held that: (1) the United States has the constitutional power in the conduct of its foreign relations to grant immunity from state real property taxes to buildings owned and used by foreign governments to house their diplomatic staff and families; (2) the United States validly exercised this power to grant immunity from real property taxation to the building owned by the GDR and used by that government to house its diplomatic staff and their families below the rank of chief of the mission; (3) the building in question was immune from state real property taxes from May 4, 1979; (4) the building in question was immune from execution for state property taxes, and (5) the doctrine of collateral estoppel did not bar the United States from litigating the tax status of this building for tax periods prior to May 4, 1979, because of the judgment in the prior case in favor of appellant against the GDR.

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[2]On remand, the district court found that the realty in question was always used by the GDR to house its diplomatic staff and their families, and that the United States was entitled to a decree that the realty was exempt from county taxation since its acquisition in 1976 by the GDR. This second decision of the district court in this case is now pending on appeal (No. 82-1389).

1. It is beyond question that the federal government possesses the sole and exclusive authority to conduct the foreign relations of the United States. *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948); *United States* v. *Pink*, 315 U.S. 203 (1942); *United States* v. *Belmont*, 301 U.S. 324 (1937); *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304 (1936); *Oetjen* v. *Central Leather Co.*, 246 U.S. 297 (1918). We do not understand appellant to challenge this proposition. Rather, appellant asserts (J.S. 14-17) that this power does not extend to relieving foreign countries from paying state property taxes on property owned and used by them in the conduct of their diplomatic relations. As appellant views the matter, the power to exempt property from tax belongs to the state government and was never delegated to the federal government.

But appellant's proposition has been repeatedly rejected by the decisions of this Court. In analyzing the source of the United States' power to conduct foreign affairs, the Court in *United States* v. *Curtiss-Wright Corp., supra*, 299 U.S. at 315-316, stated that the colonies were never individually sovereign and never had the power to make war, peace, alliances or treaties. Rather, prior to their separation from Great Britain, the colonies were subject to the English crown which possessed the powers of sovereignty. After their separation from Great Britain, the powers of external sovereignty passed from the crown to the colonies in their collective and corporate capacity as the United States of America. Thus, the Court concluded that the exclusive power of the United States to conduct its foreign relations does not depend upon any constitutionally delegated powers, but rather upon the transfer of sovereignty over the colonies from Great Britain directly to the United States as a political entity. Since the states in their individual capacities never possessed any powers of external sovereignty, nor

any powers to consummate treaties and alliances with foreign powers, it follows that the states had no foreign policy powers which they reserved to themselves.

Accordingly, it is the federal government alone that possesses the sole and exclusive power to conclude agreements with foreign countries in which a foreign nation is formally recognized. A foreign government's consular and diplomatic missions are admitted into the United States upon such terms as the United States in its sole discretion deems fit. Indeed, Article II, Sections 2 and 3 of the Constitution recognize that the sending and receiving of ambassadors and other public ministers is a responsibility of the President of the United States acting on behalf of the federal government. Therefore, this Court has recognized that the Constitution commits to the President alone the power to recognize, and withdraw recognition from, foreign governments. Hence, agreements in which states are recognized and diplomatic relations established need not require the participation of the Senate. Once such an agreement is concluded, it becomes the supreme law of the land binding upon all the states. *United States* v. *Pink, supra; United States* v. *Belmont, supra.* See also *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 410 (1964).

Agreements relating to the taxation of property owned and used by a foreign government to house its diplomats undeniably come within the federal government's power to conduct foreign relations and to send and receive ambassadors and other ministers.[3] Hence, executive agreements,

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[3]The question of taxing property used and persons engaged in the exchange of diplomatic missions has long been regarded as involving international relations. E. Denza, *Diplomatic Law* 198-199 (1976); E. Satow, *A Guide to Diplomatic Practice* 228-241 (4th ed. 1957); Bishop, *Immunity from Taxation of Foreign State-Owned Property,* 46 Am. J. Int'l L. 239 (1952). The United States has entered numerous treaties to grant tax exempt status to real property owned and used by a sending nation for public and noncommercial purposes including housing for

such as the one at issue here concluded between the United States and the GDR on May 4, 1979, do not in any manner unconstitutionally deprive the Commonwealth of Virginia of any power reserved to it.[4] See also *Missouri* v. *Holland*, 252 U.S. 416 (1920).

2. Appellant further contends (J.S. 9-13) that even if the United States had the power to exempt the property in question from taxation, no valid international agreement or other federal law exempted the GDR owned building from real property taxes in Virginia.

The May 4, 1979 Agreement between the United States and the GDR specifically provides that the property owned and used by the GDR to house the staff of its diplomatic mission and their families is exempt from all real property

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staff members of the sending nation's diplomatic mission. A compilation of such treaty provisions is published at 59 Am. J. Int'l L. 113 *et seq.* (1965). Some treaties specifically exempt residential property, such as is involved here, from taxation. See, *e.g.*, Art. XII of the Consular Convention of June 6, 1951, with the United Kingdom, 3 U.S.T. 3426, T.I.A.S. No. 2494. See also *United States* v. *City of Glen Cove*, 322 F. Supp. 149 (E.D. N.Y.), aff'd per curiam, 450 F. 2d 884 (2d Cir. 1971). Other treaties employ more general language, but have consistently been interpreted by the United States as exempting from taxation property owned by the sending nation and used for housing diplomats. See, *e.g.*, Art. III of the Consular Convention with Liberia, Oct. 7, 1938, 54 Stat. 1752, T.S. No. 957, whose interpretation is reported in *1976 Digest of United States Practice in International Law* 200 (1977).

[4] As the court below properly recognized (J.S. App. 11a), appellant's reliance (J.S. 15-16) upon *Nevada* v. *Hall*, 440 U.S. 410 (1979), is misplaced. That case dealt only with the relationship of two states within the Federal Union. There, the Court said nothing that could be taken to indicate that a state of the Union was sovereign and of equality with a foreign state, or speak to the question presented here. Equally inapplicable is *Pierce* v. *State*, 13 N.H. 536 (1843), aff'd, 46 U.S. (5 How.) 504 (1847), upon which appellant relies (J.S. 16). That case involved the question of a state's power to regulate interstate commerce, and did not speak to the problem of taxation and diplomatic relations presented here.

taxes. The agreement was not only authorized by Section 4 of the Diplomatic Relations Act (J.S. App. 42a), but comes within the constitutional power of the Executive Branch of the federal government to conclude agreements in recognition of foreign governments and the establishment of diplomatic relations.

Section 4 of the Diplomatic Relations Act provides that "[t]he President may, on the basis of reciprocity and under such terms and conditions as he may determine, specify privileges and immunities for members of the mission, their families, and the diplomatic couriers of any sending state which result in more favorable treatment or less favorable treatment than is provided under the Vienna Convention."[5] The Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, deals with, *inter alia*, the taxation of property used by a sending state in the conduct of its diplomatic relations (see Arts. 1(i), 23(1), 34(b), and 47 of that Convention; J.S. App. 47a-49a). Article 47(2) of that Convention recognizes that states might extend, by custom or agreement, more favorable treatment than is required by that Convention. Section 4 of the Diplomatic Relations Act was enacted specifically to allow the President to enter into agreements contemplated by Article 47. S. Rep. No. 95-958, 95th Cong., 2d Sess. 5 (1978). Since the Vienna Convention deals with the tax status of property owned by the sending government or its diplomats and used in connection with the conduct of its diplomatic relations, Congress clearly envisioned that agreements like the U.S.-GDR Agreement of May 4, 1979, would come within the scope of Section 4 of the Diplomatic Relations Act.[6]

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[5]By Exec. Order No. 12101, 43 Fed. Reg. 54195 (1978), the President delegated the power to enter such agreements to the Secretary of State.

[6]Appellant argues (J.S. 9-10) that Section 4 of the Diplomatic Relations Act authorizes the extension of privileges only to members of the diplomatic missions and not to their governments. But the court below

Moreover, the President's constitutional power to control and conduct the foreign relations of the United States is an equal and independent source of power to enter agreements such as the May 4, 1979 Agreement, which have the dignity of treaties and are binding on the states under the Supremacy Clause. In *United States* v. *Belmont, supra,* the Court held that executive agreements dealing with the recognition of foreign governments had the dignity of treaties and were part of the supreme law of the land. See also *Terlinden* v. *Ames,* 184 U.S. 270, 280, 289 (1902); *Guaranty Trust Co.* v. *United States,* 304 U.S. 126, 137 (1938); *Ozanic* v. *United States,* 188 F. 2d 228, 231 (2d Cir. 1951). The recognition process necessarily includes the determination of the grounds upon which diplomatic relations will be conducted. The May 4, 1979 Agreement between the United States and the GDR was ancillary to their Sept. 4, 1974 Agreement that established diplomatic relations between the two countries, and was therefore an exercise of the

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properly rejected such a contention (J.S. App. 8a). As the court recognized (J.S. App. 8a), even though Section 4 speaks in terms of extending privileges to diplomats, it necessarily speaks in terms of the sovereign that sent them and for whose benefit the diplomats receive their privileges. As Chief Justice Marshall pointed out in *The Schooner Exchange* v. *McFaddon,* 11 U.S. (7 Cranch) 116, 136-137 (1812), privileges are extended to diplomats because of the dignity of the foreign sovereign they represent.

Nor does the addition of the words "the mission" in the recent bills approved by the House and Senate support appellant's construction of the statute. As the history of the bills in both the House and Senate indicates, the addition of the words "the mission" was intended to foreclose the argument that Section 4 did not apply to the mission and was in accord "with the State Department's interpretation of the present law," and was "merely designed to correct an earlier drafting oversight." H.R. Rep. No. 97-102 (Pt. 1), 97th Cong., 1st Sess. 44 (1981); S. Rep. No. 97-283, 97th Cong., 1st Sess. 20 (1981); S. Rep. No. 97-329, 97th Cong., 2d Sess. 21 (1982). It is clear from these reports that missions as well as diplomats were already covered by the current law.

Executive's exclusive power to recognize foreign nations on the terms it deems appropriate and to settle disputes which arise as to the terms and application of such recognition agreements.

In sum, the courts below correctly held that the May 4, 1979 Agreement with the GDR is a valid agreement that exempts the property in question after May 4, 1979, from the real property tax that appellant seeks to impose.[7]

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[7]Appellant contends (J.S. 12-13) that if the May 4, 1979 Agreement is invalid, there is no other basis to support the decision below. But the government demonstrated in the courts below that the real property in question was exempt from state taxation from the time that the GDR purchased the building and used it to house its diplomats, except for the chief of the mission. Exemption from taxation is granted by the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, Arts. 1, 23 and 34 (J.S. App. 47a-48a), by customary international law, and by Art. XIX of the Treaty of Friendship, Commerce and Consular Rights with Germany, Dec. 8, 1923, 44 Stat. 2149.

As we have pointed out (*supra*, pages 3, 10), the United States and the GDR established diplomatic relations in accordance with the 1961 Vienna Convention on Diplomatic Relations. Article 23(1) of that Convention provides that the sending state and the head of the mission are exempt from all national, regional and municipal taxes in respect to the premises of the mission and buildings used for the purpose of the mission, including the residence of the head of the mission. But the Convention is capable of a broader reading that exempts all buildings used for the purpose of the mission.

Moreover, the property in question is exempt under customary international law, which, as this Court has recognized, is part of our law. *Hilton* v. *Guyot*, 159 U.S. 113, 163 (1895); *The Paquete Habana*, 175 U.S. 677, 700-701 (1900); *Geofroy* v. *Riggs*, 133 U.S. 258, 271 (1890). See also Art. 38(1) of the Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1031, T.S. No. 993. The preamble to the 1961 Vienna Convention provides that questions not specifically covered by that Convention would be resolved by reference to customary international law. In this respect, the State Department demonstrated to the courts below that under customary international law, the property in question is exempt from real property taxes (A. 103-110). Indeed, the numerous bilateral conventions (see *supra*, pages 8-9, note 3) that exempt property owned and used by a foreign state to house their

3. Appellant also contends (J.S. 16-18) that the realty in question is subject to execution in satisfaction of the judgment of September 7, 1978, for the 1977 taxes on that property. The court of appeals, however, correctly rejected this contention. It held that at least since the Agreement of May 4, 1979, foreclosure was prohibited by 28 U.S.C. 1609, which prohibits (with certain exceptions not here applicable) attachment, arrest and execution on property owned by a foreign state in the United States. Moreover, foreclosure, executions and attachments of property used for purposes of maintaining a diplomatic mission are specifically prohibited by 28 U.S.C. 1610(a)(4)(B). Here, the May 4, 1979 Agreement, clearly included property used for maintenance of a diplomatic mission realty owned and used by the GDR for its diplomatic staff and their families. Indeed, as a subsequent agreement, it defined the property included

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diplomats from real property taxation constitute evidence of a customary practice that has the force of law. See *New Jersey* v. *Delaware*, 291 U.S. 361, 383 (1934); *The Nottebohm Case (Liechtenstein* v. *Guatemala)*, [1955] I.C.J. 4, 22-23.

Finally, Article XIX of the 1923 Treaty of Friendship with Germany provides that lands and buildings owned by one of the contracting parties in the territory of the other contracting party and used for a governmental purpose are exempt from national, state or municipal taxes of every kind. The State Department has consistently held that this provision in our treaties exempts property like that in question from real property taxes. See, *e.g.*, *1976 Digest of United States Practice in International Law* 200 (1977); 7 M. Whiteman, *Digest of International Law* 318-319 (1970). Similar treaty provisions are entitled to the same construction. *Factor* v. *Laubenheimer*, 290 U.S. 276, 294, 301 (1933); *Charlton* v. *Kelly*, 229 U.S. 447, 467-468, 473 (1913); *Wildenhus's Case*, 120 U.S. 1, 12-17 (1887). Although this treaty was not mentioned in the agreement by which the United States and the GDR established diplomatic relations, the treaty is still in force with that country (*Clark* v. *Allen*, 331 U.S. 503, 508-509, 514 (1947); *Zschernig* v. *Miller*, 389 U.S. 429, 432 (1968)) and nothing in the agreement establishing diplomatic relations between the two countries has abrogated Article XIX of that 1923 Treaty of Friendship as it applies to the GDR.

in the diplomatic mission for purposes of 28 U.S.C. 1610(a)(4)(B). See H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 10 (1976).[8]

Nor is there any basis for appellant's argument (J.S. 17) that the building does not come within the May 4, 1979, Agreement because there was no proof that the building was used to house GDR diplomatic personnel and their families. As we have pointed out (*supra*, pages 3-4, note 1), the record clearly establishes that the housing has always been used since its purchase by the GDR to house its diplomatic personnel and their families. Indeed, appellant acknowledged in the district court that the building in question had always been used since its acquisition by the GDR to house its employees and that no factual dispute existed (A. 71-73, 134).[9]

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[8]In addition, 28 U.S.C. 1609 provides that prior international agreements were to have precedence over it and Sections 1610 and 1611. As pointed out above, under at least the 1961 Treaty of Vienna and the 1923 Treaty of Friendship with Germany, property owned and used by a foreign government to house its diplomats would be exempt from tax and execution for the tax.

In view of the May 4, 1979 Agreement, appellant errs in contending (J.S. 18) that property used for maintenance of a diplomatic mission does not include a building to house the diplomats below the rank of chief of mission because the residence of a chief of a diplomatic mission is specifically exempt from execution under 28 U.S.C. 1610(a)(4)(B). However, the very purpose of the exemption under Section 1610(a)(4)(B) is to preclude the execution of a judgment against property used for the diplomatic mission. If such property could be seized, diplomatic relations would be seriously hindered. In the area of international relations, the phrase "property * * * used for purposes of maintaining a diplomatic * * * mission" is best defined by reference to international agreements and customary international law since Congress provides no specific definitation. And as we have pointed out (*supra*, page 12, note 7), customary international law includes the building in question as property used for diplomatic mission purposes.

[9]Appellant contends (J.S. 17-18) that the court of appeals should not have accorded great weight to the views of the State Department. To be sure, a purpose of the Foreign Sovereign Immunities Act (28 U.S.C.

Appellant's argument (J.S. 16-18) that the building is subject to execution to satisfy the September 7, 1978, judgment because it was used for commercial purposes and comes within the exception provided in 28 U.S.C. 1610(a)(2), is likewise without merit. As the court below correctly pointed out (J.S. App. 14a, 16a), the legislative history indicates that this exception for commercial activities includes the rental or purchase of a building or making repairs to a building. H.R. Rep. No. 94-1487, 94th Cong., 2d Sess., *supra*, at 16. It does not, however, apply to embassies and related buildings (*id.* at 29), and the taxation of property owned and used by a foreign government to house its diplomats therefore is not taxation of a commercial activity. Accordingly, the court below correctly held that the property in question could not be executed upon by appellant to satisfy the September 7, 1978, judgment.

4. Finally, appellant contends (J.S. 19-21) that the United States is barred by the doctrine of collateral estoppel from litigating the tax status of the realty in question for periods prior to May 4, 1979, on account of the September 7, 1978, judgment in favor of appellant against the GDR. Under the doctrine of collateral estoppel, an issue actually and necessarily determined by a court of competent jurisdiction in reaching a final judgment is conclusive in subsequent suits based on different causes of action involving the same parties or their privies. *Commissioner* v. *Sunnen*, 333 U.S. 591, 597 (1948); *Montana* v. *United States*, 440 U.S. 147, 153 (1979). The United States was not a party to the

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1602-1611) was to codify State Department practice and relieve the State Department of having to make decisions on questions of tax immunity on a case-by-case basis. But the legislative history does not support appellant's hypothesis that the State Department's views on a fundamental policy matter were not to be given great weight. At all events, it is clear that the court below independently ruled that the views of the State Department were reasonable and correct.

prior litigation, did not participate in that case either directly or indirectly, and thus was not privy to any party in the prior suit.

As the court below pointed out (J.S. App. 17a-18a), privity could exist between the United States and the GDR only if one of the following relationships exits: (1) representation of the interests of the same person; or (2) a concurrent relationship to the same right of property. 1B *Moore's Federal Practice* para. 0.411[1], at 1255 (2d ed. 1982). Neither relationship exists here. The first relationship described above has been called a "substantial identity of parties" (see *Chicago, Rock Island, & Pacific Ry.* v. *Schendel*, 270 U.S. 611, 619-622 (1926)), and involves situations where the same interest of the same beneficiary is represented in different lawsuits with the same adversary by either different legal representatives of the beneficiary, or by the beneficiary himself in one lawsuit and by his legal representative in the other lawsuit. 1B *Moore's Federal Practice, supra*, para. 0.411[3], at 1435.

Here, there is no substantial identity of parties. The GDR sought to protect its sovereign and pecuniary interests in the 1978 lawsuit. In contrast, the United States in the present litigation seeks to protect its own sovereignty, to preserve its own prerogatives to make foreign policy, and to honor its international obligations as reflected in its valid agreements with sovereign nations.

The second required relationship for collateral estoppel—"privity of estate"—involves a concurrent relationship by two persons to the same right of property. 1B *Moore's Federal Practice, supra*, para. 0.411[1], at 1255-1256. This relationship is in the nature of a fiduciary relationship and involves situations such as a trustee and a trust beneficiary, a guardian and a ward, and an administrator or executor and heirs, legatees, and devisees, with respect to a decedent's estate. 1B *Moore's Federal Practice, supra*, para.

0.411[12], at 1672-1673. It is plain that there is no privity of estate because the United States owns no interest in any property owned by the GDR.[10]

At all events, collateral estoppel is inapplicable here because the district court in the prior litigation between appellant and the GDR did not consider the immunity of the property in question under Article XIX of the 1923 Treaty of Friendship with Germany. It is well established that collateral estoppel does not apply to issues not litigated in the first suit. *Montana* v. *United States, supra,* 440 U.S. at 153, 157-158; *Commissioner* v. *Sunnen, supra,* 333 U.S. at 597.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JUNE 1982

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[10]At most, the United States and the GDR have a contractual relationship by international agreement to exchange diplomatic missions, to accord such missions full diplomatic immunities and privileges on a reciprocal basis, and to accord tax immunity to each other's property used for governmental and diplomatic purposes. But contractual privity is not sufficient to give rise to a bar of collateral estoppel when the two parties to the contract become involved in separate lawsuits involving their separate legal interests under the same contract. 1B *Moore's Federal Practice, supra,* para. 0.411[12], at 1671.

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